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ABSTRACT

In 1969, in "Tinker v. Des Moines," the Supreme Court declared that both students and teachers were entitled to exercise their constitutional rights while in school. The purpose of this dissertation was to discover whether the propositions and the philosophy of "Tinker" have been used by state and federal courts to support intellectual freedom in the schools. The first two chapters survey various interpretations of the purpose and importance of free speech and examine the importance of intellectual freedom for education in a democratic society. Against this background, cases involving issues of intellectual freedom for teachers and students in public schools are then analyzed. Consideration is given to how the courts have balanced the preferred right of free speech with the unique needs and purposes of public schools. It is concluded that the major importance of the Tinker case has been its recognition and reassertion of a philosophy that respects children's individuality and uniqueness. Judging from the relevant cases reported between 1969 and 1979, the degree of support that intellectual freedom has been given by the courts does not appear outstanding. (Author/JM)

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INTELLECTUAL FREEDOM IN THE PUBLIC SCHOOLS: AN ASSESSMENT OF TINKER AND ITS PROGENY, 1969-1979

A Dissertation Presented

By

GAIL PAULUS SORENSON

Submitted to the Graduate School of the
University of Massachusetts in partial fulfillment
of the requirements for the degree of

DOCTOR OF EDUCATION

September 1980

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In Memory of

CHARLES EUGENE PAULUS

Teacher

East Palestine High School, 1929-1943
Kent Roosevelt High School, 1943-1965

PREFACE

The topic for this investigation has grown out of a longstanding commitment to the importance of intellectual freedom to democracy and to education. The point of view taken is deeply rooted in the liberal, democratic tradition--a tradition which has historically been committed to the betterment of social and individual life through education and schooling, and to a process of social change achieved through the laborious and incremental restructuring of institutions. It expresses a belief in human dignity and in the possibility of the full development of individual capacities through intelligent and free inquiry. And it is consonant with the idea put forth by John Dewey that the distinguishing feature of a democratic society is its dedication to social change that leads to growth or improvement. Implicit in the idea of growth is an underlying conception of democracy as a way of life. As Dewey said, "A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience."

The case around which much of the work for this project has focused is Tinker v. Des Moines Independent Community School District. It is a case which reaffirmed that students and teachers retain their constitutional rights while in school at a time when the hierarchical nature of educational institutions and an attitude of paternalism toward students had led many people to ignore or forget our basic societal commitment to the principles of freedom, equality, and human dignity. Despite the uniqueness of their respective vocational positions, both teachers and students are people. They are also citizens who are entitled to a full panoply of rights while in school.

The purpose of the present investigation was to discover how the Tinker case has been used to promote or hinder the development of a climate of intellectual freedom in the public school setting. More generally, the purpose was to discover if the spirit of Tinker is thriving in the schools and in the courts as seen from cases where issues of intellectual freedom have arisen and been resolved.

Chapter I provides information on the purpose and importance of free speech from a historical perspective. Chapter II suggests the relationship between intellectual freedom and education in a democratic society; and it describes and analyzes the Tinker case and some of the means courts have used to implement free speech. Chapters III, IV, and V present the results of an investigation of how the state and federal courts have dealt with intellectual freedom in public schools in the post-Tinker period. And Chapter VI presents conclusions which can reasonably be drawn from the investigation and recommendations for the more effective realization of the ideal of freedom of intercommunication in public schools.

I would like to acknowledge and thank John Brigham of the University of Massachusetts Political Science Department for the advice and encouragement given to me on this project. And I would like to thank my advisors Louis Fischer and David Schimmel, lawyers and professors of education at the University of Massachusetts, for their support and friendship over the last several years. In addition, I would like to thank Al Sorenson--typist, supporter, and friend.

ABSTRACT

Intellectual Freedom in the Public Schools:

An Assessment of Tinker and Its Progeny, 1969-1979

September, 1980

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In the famous black armband case of Tinker v. Des Moines, decided in 1969, the Supreme Court declared that students were persons and that both students and teachers were entitled to exercise their constitutional rights while in school. It is generally believed that this case helped to usher in a new era of judicial protection of the fundamental constitutional rights of teachers and students. The purpose of this dissertation was to discover whether the propositions and the philosophy of Tinker have been used by state and federal courts to support intellectual freedom in public schools.

The philosophical framework of this project is derived from the liberal, democratic tradition, with its belief in human dignity and in the possibility of the full development of individual capacities through intelligent and free inquiry. The first two chapters survey various interpretations of the purpose and importance of free speech and examine the special importance of intellectual freedom for education in a democratic society.

Against this background, cases involving issues of intellectual

freedom for teachers and students in public schools were analyzed. Consideration was given to how the courts have balanced the preferred right of free speech with the unique needs and purposes of public schools. The student's right to speak and not to speak; to know and not to know were examined in a wide variety of situations involving oral and written speech. The scope and limits of the teacher's freedom to speak and not to speak in school and classroom situations were considered.

From the above analysis it was concluded that the major importance of the Tinker case has been its recognition and reassertion of a philosophy toward children which respects their individuality and uniqueness. Students, despite their special role, are people who retain their constitutional rights wherever they go. To curtail those rights--especially the fundamental right of free speech so important to education itself--requires extraordinary justification, not merely reasonable justification. By analogy, teachers, too, are people who retain their constitutional rights while in school. While the right of free speech which students and teachers retain must be adjusted to the special characteristics of the school environment, it must also be especially protected and promoted in order to facilitate the educational process.

Judging from the relevant cases which have arisen and been reported from 1969-1979, school officials often act to promote institutional order at the expense of freedom of expression. In resolving these conflicts, courts have shown a relatively speech-protective approach in about half of the cases considered and a relative lack of speech-protectiveness in about a quarter of the cases considered. If it is

assumed, as seems likely, that the contested and reported cases represent particularly egregious instances of institutional repressiveness, the degree of support that intellectual freedom has been given by the courts does not appear outstanding.

There is still much to be done to protect intellectual freedom in educational settings. Neither educators nor judges have fully realized that while the public school is a place where speech occasionally may have to be curtailed to advance important educational objectives, it is also a place where it should arguably be protected and promoted more than in any other. A school is a unique place primarily because it is dedicated to teaching and learning. Intellectual freedom not only advances this purpose, but it is the principal end of education in a democracy as well.

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CHAPTER I

FREEDOM OF SPEECH: THE HISTORY OF AN IDEA

> If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought that we hate.
>
> Justice Oliver Wendell Holmes, Jr.
> U.S. v. Schwimmer (1928)

Introduction

The definition of freedom of speech, intellectual freedom, or, as it is sometimes called, tolerance--its scope, limits, purposes and importance and the means for its realization--is a vital matter of social, political, and legal philosophy. It is a definition that has evolved historically and which continues to evolve, so that it will vary depending upon the culture and time in which it is discussed. Even cultures which place high value on the principle of intellectual freedom can implement that principle according to very different understandings of its importance and purpose. This can be illustrated by the example of the second Moscow International Book Fair which took place in September of 1979. According to the conditions for participation, books which advocated war or racial or national exclusiveness, were offensive to the national dignity of other exhibitors, were anti-Soviet in character, or were considered pornographic or incompatible with public morals were not to be admitted. Pursuant to this policy, Soviet censors confiscated more than forty books from the exhibits of American publishers. In defense of the official action of Soviet authorities, the chairman of

the State Committee for Publishing Houses, Boris Stukalin, argued: "Books of that nature do not bring people closer together and do not serve the cause of detente. Instead, they stir up hatred and hostility between people and hamper the process of detente."[1] Mr. Stukalin further elaborated that book censorship of this sort was not a violation of the principle of free speech: "This is the highest affirmation of freedom of speech, since freedom to propagandize fascism is the kind of freedom that all honest people in our country and in other countries must oppose."[2] The implication appears to be that peace and preservation of the Soviet way of life are overriding values, and further that they are values which must be protected as practical and moral necessities to the effective realization of freedom of speech itself. Suppression is thus justified as a means to the end of freedom.

In 1923, C.E. Ruthenberg, the National Secretary of the Workers' Party of America, explained that while the principle of free speech was not opposed by Communists, it was first necessary to bring about the conditions which would give equal opportunity for freedom of speech to all. Those conditions would exist when the educational system and the means of communication were no longer controlled by the dominant capitalist class. "We believe that in our fight for Communism we are also fighting for those conditions which will, for the first time, make real freedom of speech, through putting on a basis of equality all groups and individuals in the social order."[3]

This point of view, which seems somewhat paradoxical to the mind nurtured in the liberal tradition, is not new but is on the ascent in contemporary political philosophy. It has been elaborated most recently

in the United States by the late professor and philosopher Herbert Marcuse who argued that because we are "enslaved by institutions that vitiate self-determination," pure tolerance must not be permitted. Freedom of expression must not be allowed to "protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation."[4] Because of the emergency situation presently faced by our society, Marcuse would allow the inevitably small groups who have attained "maturity of [their] faculties" to decide on what would be tolerated for all. Marcuse argued that, given present conditions, censorship is necessary to bring about the development of conditions that would be liberating and humanizing.

The Marcusian philosophy was adopted by one student member of the committee which examined freedom of expression at Yale University in 1974. The committee, which was chaired by the noted historian C. Vann Woodward, was formed after an incident in April of 1974 where Professor William Shockly of Snanford University was physically prevented from speaking at Yale because of his controversial views concerning genetic differences between races. Kenneth J. Barnes, a law student and graduate student in economics, argued that free speech cannot become a possibility until we are liberated from unequal power relations, an oppressive ideology, and irrational factors which condition knowledge. He concluded that "[u]nder certain circumstances, free expression is outweighed by more pressing issues, including liberation of all oppressed people and equal opportunities for minority groups."[5] Like Marcuse, Barnes assumed that liberation can plausibly be brought about through temporary suppression of certain ideas.

These attacks on the traditional liberal notions of free speech which emmanate from the political left are joined by perhaps more virulent attacks from the political right--more virulent because they question the basic value of intellectual freedom as well as the means used to implement it. The most violent incident of attempted censorship of ideas that has taken place in recent years occurred throughout the summer and fall of 1974 in Kanawah County, West Virginia. A local school board member, various fundamentalist religious groups and an organization called Christian American Parents mounted a crusade against three hundred different language arts textbooks. Although the attempted censorship was eventually unsuccessful, there were picketing, strikes, boycotts, and violence which led to the closing of the public bus system, a trucking terminal, mines, and several stores and factories. One elementary school and several cars were bombed. It has been reported that many of the same national groups which were active in the attempted censorship in Kanawah County--including the Ku Klux Klan, the John Birch Society, Citizens for Decent Literature, and Citizens for Decency Through Law--were involved in incidents in several other states as well.[6]

These illustrations are not given to suggest that incidents such as the one in Kanawah County are likely to become everyday occurrences, or in order to advocate the adoption of a radically different perspective on the function, importance, and means of securing freedom of speech and intellectual freedom in our society. They are meant only to illustrate that the philosophical issues surrounding the theory and methods of intellectual freedom continue to be debated. Although freedom of speech may not appear to be the most pressing issue of the present decade, it

is certainly always an issue of importance. I would agree with Zechariah Chafee, Jr., one of the most prolific defenders of civil liberties in American jurisprudence, that, "[l]iberty of discussion must itself be constantly discussed."[7] Is liberty of discussion valuable? Is it useful to conceive of freedom of speech as an absolute value? If not, what are its limits? Should it be a value which is preferred in our society? If so, how is this preference to be promoted, and what are the limits of the preference? Is intellectual freedom valued as a means, as an end, or as both?

The remainder of the first chapter will selectively survey some recurrent themes in the literature of freedom of speech from Plato to various English and American antecedents. Special emphasis will be placed on the purposes and means that have been expressed for the preservation and encouragement of intellectual freedom. In Chapter II the interrelationship of these social and individual purposes with the purposes of contemporary education in the United States will be suggested. It will be argued that freedom of speech and intellectual freedom are fundamentally intertwined with the purposes and methods of education. If free speech can be said to be a necessary requisite to education, it is also true that behavior that has educative consequences will broaden and deepen the ability to inquire intellectually and to speak freely and intelligently.

Freedom of Speech: "Invaluable Sources"

The recorded tradition of the censorship of thought, belief, and speech begins in the West with the death of Socrates in 399 B.C.

Socrates was officially condemned for corrupting the youth of Athens and for believing in new divinities, but his death was surely as much a result of the fact that he disturbed the intellectual complacency of the Athenian population with his method of cross-examination and his scientific approach to issues of human concern. He called himself a gadfly to the state--arousing and testing the ideas of the populace. Although he might have saved himself, Socrates refused to give up his teaching, affirming that "daily to discourse about 'virtue,' and of those other things about which you hear me examining myself and others, is the greatest good of man, and that the unexamined life is not worth living. . . ."[8] Socrates did not defend or justify the importance of the search for virtue (or excellence) and truth as much as he extolled and affirmed it by his willingness to "die many times." It is here in Plato's account of the trial of Socrates that an early indication of the notion of truth-getting as a process can be found. Virtue and truth, according to Socrates, arise through continual discourse and questioning.

Just as Socrates believed that the unexamined life was not worth living so John Milton believed that the freedom to know and to speak freely was the most important freedom: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[9] In "A Speech for the Liberty of Unlicensed Printing," the Areopagetica, composed in 1644, Milton made an eloquent plea to redress what he saw as the evils of censorship. In one of the most striking passages, Milton personifies books and analogizes their censorship and destruction to the killing of reason itself.

> We should be wary therefore what persecution we raise against the living labours of public men, how we spill that seasoned life of man, preserved and stored up in books; since we see a kind of homicide may be thus committed, sometimes a martyrdom, and if it extend to the whole impression, a kind of massacre; whereof the execution ends not in the slaying of an elemental life, but strikes at that eternal and fifth essence, the breath of reason itself, slays an immortality rather than a life.[10]

But censorship, according to Milton, kills more than reason, it also kills truth. Viewing truth more perhaps as a thing to be got once and for all rather than as something in the process of redefinition, Milton uses his famous battle metaphor to argue that licensing is "weakness and cowardice in the wars of Truth" and to argue that truth will be victorious if allowed to fight freely:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[11]

In addition to allowing for the development and expression of reason and the discovery of truth, Milton believed that freedom of communication was instrumental in the development of a shared though diverse culture and the promotion of progressive change. He believed that a nation was a harmony of differences that come about through natural interaction of individuals within a culture and not through an imposed unity which would lead to "a gross conforming stupidity, a stark and dead congealment of wood and hay and stubble, forced and frozen together. . . ."[12] With mocking irony, Milton speaks of the kind of unanimity that would be wrought by a cessation of learning: "How goodly and how to be wished were such an obedient unanimity as this, what a fine conformity would it starch us all into! Doubtless a staunch and

solid piece of framework, as any January could freeze together."[13]

But for Milton, as for Socrates before him, the virtue of intellectual freedom was more than its instrumental service to the discovery of truth for social purposes. Just as Socrates believed that every good of human beings both public and private derived from virtue, so Milton believed that knowledge was a "flowery crop," a "new light" and that the lack of intellectual freedom was an affront both to learning itself and to individual human dignity. Censorship is "the greatest displeasure and indignity to a free and knowing spirit" as well as an "undervaluing and vilifying of the whole Nation."[14] Learning, discourse, the use of human reason--these are things to be valued for themselves and as an affirmation of respect for human dignity as well as for their role in social change and cultural evolution.

It was left to John Stuart Mill in his 1859 essay "On Liberty" to fully express the cardinal principle of the liberal tradition. That principle is expressed in a quote by Wilhelm Von Humboldt with which Mill chose to introduce his essay. The selection demonstrates that for Mill the "absolute and essential importance of human development in its richest diversity" is the primary goal of all liberty.[15] Like Milton and Socrates before him, Mill believed that the liberty of first importance was that of thought, speech and writing. He presents what is widely considered to be the classic liberal argument for freedom of expression. Since human beings are fallable, intellectual freedom is needed to discover, enlarge, and affirm an understanding of truth. Mill believed that we need to allow our most warranted beliefs to be open to challenge and correction of error. Although perhaps too

simplistic by modern standards, expression of opinion was to be absolutely privileged, according to Mill, unless it would directly harm specific individuals.

Just as for Socrates and Milton, the truth-seeking function of intellectual freedom is of major importance for Mill. Unlike Milton, however, who felt that truth emerged from a battle, Mill believed that the more common case was that conflicting doctrines "share the truth between them." "Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites. . . ."[16] Truth is not so much ready-made as synergistically created. Mill was also somewhat more realistic than Milton, who felt that truth needed merely to be stated to be seen for what it was, at least if one looked at least twice. Milton said that truth might be prohibited accidentally because "its first appearance to our eyes is more unsightly and unplausible than many errors. . . ."[17] Mill, on the other hand, felt that truth did not always triumph naturally or survive despite censorship, but that it was discovered and rediscovered over the course of time.

In addition to the truth-seeking function of intellectual freedom, for Mill this liberty also provided protection against tyrannical governments and led to the improvement of the human condition. Mill saw more clearly than others the function of intellectual freedom in allowing for the interpretation of experience, thereby deepening understanding and making individual human experience more meaningful. In this regard Mill presaged those twentieth century psychologists and philosophers who have concluded that self, mind, and personality develop through a process of social and environmental interaction.[18] As for the

wider social importance of intellectual freedom, there is evidence that Mill felt that diversity of opinion--especially religious and philosophical sectarianism--was an evil which would lessen with greater opportunities for freedom of speech. That Mill hoped for the day when a higher state of intellectual development would lead to stability and make diversity of opinion unnecessary suggests that he felt the social world could arrive at some fixed truth once and for all. This truth would then only have to be reaffirmed through continued freedom of speech so as not to be held as "dead dogma." Although this latter belief may be controversial, its acceptance or rejection does not detract from Mill's general argument that expression of opinion is to be absolutely protected absent personal or public harm, and that the ultimate goal of liberty is the development of individual human beings.

Fourteen years after the appearance of Mill's "On Liberty," James Fitzjames Stephen, a former student of Mill's, published a critique which illustrates several controversies that have continued to the present day.[19] Stephen, who was influenced by Thomas Hobbes, felt that Mill formed "too favourable an estimate of human nature" and that the result of unlimited freedom of speech was usually scepticism.

> The real difference between Mr. Mill's doctrine and mine is this. We agree that the minority are wise and the majority foolish, but Mr. Mill denies that the wise minority are ever justified in coercing the foolish majority for their own good, whereas I affirm that under circumstances they may be justified in doing so. . . ."[20]

The first controversy thus concerns the nature of human nature, and the limits of liberty. It echoes the book censorship controversy that opened the chapter.

The second controversy appears when Stephen mounts a more general attack on what he perceives as Mill's absolute stand in favor of freedom of expression of opinion, and asserts in contrast that whether or not liberty should be allowed is dependent on the situation.

> If, however, the object aimed at is good, if the compulsion employed such as to attain it, and if the good obtained overbalances the inconvenience of the compulsion itself I do not understand how, upon utilitarian principles, the compulsion can be bad.[21]

Of course, Stephen is correct that an unrefined utilitarianism is not consistent with the assertion of absolute principles such as liberty of thought and discussion. A utilitarian ethical theory would require that all principles be amenable to adjusted implementation depending upon the good sought and the means necessary to acheive it. I don't think Mill would disagree except perhaps with the limits of adjustment. But more generally, the argument that liberty, including intellectual liberty, is necessarily limited by the particular context in which it is exercised has been an important and controversial issue to the present time.

Some modern jurisprudential scholars have argued that the importance of free speech places it in an invulnerable position, where it cannot be defeated and where its force and power are absolute, especially when matters of political importance are concerned.[22] Justice Black has argued forcefully that when the abridgement of speech is direct it should be absolutely protected.[23] Others have argued that although freedom of communication deserves a special place in our hierarchy of values, which is something that Stephen did not argue in 1873, it is not possible to say in advance of any particular situation that it should be

absolute.[24] But among the Supreme Court Justices at least, the position of the absolutists has never commanded majority support. A principled balancing of various values and interests in context, because it is pragmatic and empirical, continues to be the dominant philosophy.[25]

The essay by Stephen just discussed along with the ones preceding it are mentioned in Zechariah Chafee's 1920 and 1941 bibliographies on freedom of speech as "invaluable" in developing an understanding of the political and philosophical bases of such freedom.[26] This is a prerequisite, he feels, to the full understanding of the legal meaning of freedom of speech. To the essays discussed above, Chagee adds one other, "The Metaphysical Basis of Toleration" by Walter BAgehot, published in 1874.[27] In this essay some themes previously considered are repeated and some new themes appear for the first time.

Like Socrates, Milton, and Mill before him, Bagehot puts major emphasis on the truth-getting function of toleration, which he defines as the legal protection of the public expression of opinion. Discussion "promotes the progressive knowledge of truth, which is the mainspring of civilization."[28] Although it is not clear whether he means to say that truth is something we come closer to getting the more we engage in discussion or whether he means that what is considered true changes, there is at least some indication that truth-getting is an active process rather than something to be accepted as a given. Like Milton, Bagehot believes that truth has an advantage against error if the human mind is left free to do its logic. "Strong and eager minds" play the part of advocates of opinion, some true and some false. Meanwhile the "cooler people" serve as "quasi-judges" in the court of centuries where "truth

has the best of the proof, and therefore wins most of the judgments."[29] So, Bagehot adds one more metaphor to truth-getting as a search, a battle, and a reconcilliation in collision--that of a courtroom drama.

Bagehot is more like Mill's critic Stephen insofar as he shares Stephen's rather Hobbesean view of human nature. Bagehot believes that the desire for persecution or censorship is deeply rooted in human nature and that it is perpetuated more to stop political danger than to arrest intellectual error. Although Bagehot does not mention it, this appears to have been the case with Socrates, whose greatest sin was perhaps that he was a gadfly to the State. More recent examples of the desire to arrest political dissent can be illustrated by the appearance of laws against seditious libel--laws aimed at preventing political divisiveness and strife by prohibiting certain categories of speech. Even if Bagehot is wrong and the major motive for censorship is not to stop political danger, the maintenance of law and order in the state and in society has been a recurring justification for suppression of speech.

Although Bagehot argues for freedom of opinion and discussion in all matters, he does admit that there should be two conditions or limitations to that freedom. The conditions he presents concern issues of continued importance, the first to free speech in general and the second to intellectual freedom in the context of the education of children. The first limit that Bagehot states if that "[n]o government is bound to permit a controversy which will annihilate itself: it is a trustee for many duties, and if possible it must retain the power to perform those duties."[30] In contemporary jurisprudence, the limit of free speech critical of government would be precisely where that speech presented a

a "clear and present danger." In the language of the most recent definitive Supreme Court case on the issue, advocacy which is 1) "directed to inciting or producing imminent lawless action" and which is 2) "likely to incite or produce such action" can be prohibited or prevented consistent with the Constitution.[31] So that while it is true that government must not permit a controversy that will annihilate itself, in order to prevent speech the threat of that annihilation must be intentional, immediate, and serious.

The second condition to complete liberty of expression that Bagehot states is that free speech cannot apply to the uncivilized and to children because such people are incapable of engaging in rational discussion. Bagehot also believes that before there was a common national character that a "coercive despotism" was necessary, and that coercion should be ended only when the rulers determine that the citizens are mature enough to engage in enlightened interchange. Although our present liberal philosophy would deny the necessity of such paternalism with regard to adults, the argument that Bagehot makes has been much more readily accepted with regard to children, whom Bagehot analogizes to intellectually immature citizens.

> The case is analogous to that of education. Every parent wisely teaches his child his own creed, and till the child has attained a certain age it is better that he should not hear too much of any other. His mind will in the end be better able to weigh arguments because it does not begin to weigh them so early; he will hardly comprehend any creed unless he has been taught some creed: but the restrictions of childhood must be relaxed in youth and abandoned in manhood. One object of education is to train us for discussion; and as that training gradually approaches to completeness, we should gradually begin to enter into and to take part in discussion. The restrictions that are useful at nine years old are pernicious at nineteen."[32]

Just as citizens need the coercive despotism of their rulers, so children need that of their parents. This is an idea that has been accepted almost without question with regard to the treatment of children and incompetents in the legal system of twentieth century America. We are only now beginning to sort out the illegitimate issues of paternalism from the legitimate and genuine concerns for the mentally disabled and for children who are in the process of maturing developmentally. This question of the proper balance between education and indoctrination, between freedom of inquiry and socialization will be seen to be at the heart of many of the free speech cases presented in the later chapters.

There is one more idea of immediate concern which Bagehot raises that, although generally discredited by contemporary legal scholars, continues to appear in legal opinions. Bagehot tries to draw a distinction between speech and action analogous to John Stuart Mill's attempted distinction between the self and others illustrated by the assertion that one is at liberty to do anything that does not affect another adversely. Bagehot states: "It is plain, too, that the argument here applied to the toleration of opinion has no application to that of actions."[33] Just as Stephen, the poet John Donne, and others have made the point that no man is an island, so contemporary legal scholars have discussed the difficulty or impossibility of determining whether symbolic behavior, for example, should be classified as speech or action.[34] To the extent that one realizes the difficulty of making absolute distinctions between speech and action, the distinction may continue to be useful in understanding free speech cases containing elements of both. The problem is that speech is expressive behavior and

some action is, as the Supreme Court has realized, very close to pure speech. It is at least necessary to understand that this distinction has been relied upon heavily in past free speech cases. Whether or not it will be relied on in the future is debatable. Bagehot is not the first nor the last person to assume that such a distinction could be made easily and effectively.

Freedom of Speech: Old and New Themes

The truth-getting function of free speech that had been of primary importance since the time of Socrates, continued to be thought of as a principal concern for centuries. Not only were such writers and scholars as Milton, Mill, and Bagehot expressing this purpose, but the thought that the whole truth results from a variety of opinions continued to be colorfully expressed by commoners and popularizers. A good example is Wendell Phillips, a nineteenth century minister and social reformer:

> No matter whose the lips that would speak, they must be free and ungagged. Let us believe that the whole of truth can never do harm to the whole of virtue. . . . The community which dares not protect its humblest and most hated member in the free utterance of his opinions, no matter how false or hateful, is only a gang of slaves.
>
> If there is anything in the universe that can't stand discussion, let it crack.[35]

In the first year of the twentieth century, the English philosopher Herbert Spencer reaffirmed freedom of discussion as the agency of truth. In his Principles of Ethics he states that "regard for experience may reasonably prevent us from assuming that the current beliefs are wholly true. We must recognize free speech as still being the agency by which error is to be dissipated. . . ."[36]

Founding fathers, too, expressed their high regard for freedom of discussion. Thomas Jefferson, in his 1801 inaugural address, invokes the battle metaphor of Milton:

> If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.[37]

And the famous writer and Supreme Court Justice, Oliver Wendell Holmes, updated Milton's metaphor of a battle to a "marketplace of ideas"--an analogy more suited to the twentieth century.

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .[38]

Zechariah Chafee, as well, reaffirmed the truth-getting function of freedom of speech in his two seminal works on that subject appearing in 1920 and 1941 respectively.[39]

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion. . . .[40]

For Chafee, however, freedom of speech was not a romantic, wholly relative method whereby the truth would emerge unaided by the application of intelligence: "The tolerance I propose involves no mushy latitudinarianism. Willingness to hear all views does not mean that we should, after hearing them, treat them all as of equal value."[41] Chafee was also well aware of the obstacles to the "automatic emergence of truth from the contest" presented by inequalities of power, prejudice, and a multiplicity of issues and arguments.[42] He might have been thinking of

Milton when he allowed that the great writers had misled us somewhat by encouraging us to expect the truth to emerge too easily from discussion. Chafee, however, follows fundamentally in the same liberal tradition by his staunch advocacy of the method of freedom of discussion, though imperfect and slow, as the best means available to discover and disseminate worthwhile ideas.

Zechariah Chafee was one of the first judicial scholars to argue that the provisions of the Bill of Rights, including the guarantee of freedom of speech could not be absolute. He urged that one must look to history, to social purposes, and to the human facts behind the rules of law in order to balance this preferred right with other important values. In other words, one must look to the context.[43]

> [T]here are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale.[44]

Along with Ernst Freund, Chafee felt that the limit of free speech was at that "point where words will give rise to unlawful acts."[45] As Freund put it in 1904: "Freedom of speech finds, however, its limit in incitement to crime and violence."[46] This limitation is similar to the governmental self-preservation condition proposed by Bagehot. And although the scholars have suggested some possible limitations on freedom of discussion, the troubling question of just how to accomplish this process of balancing while preserving intellectual freedom remains.

The purposes of freedom of speech which have been surveyed up to this point have been very largely instrumental in nature--the primary purpose being to discover truth and to promote social progress. There

are, however, additional English and American antecedents which show a concern for intellectual freedom as an affirmation of personal human dignity. In addition to his belief that "the greatest liberty of discussion" leads to social betterment, Robert Hall, an English divine, wrote in 1845:

> Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any Constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end.[47]

The American naturalist and writer, Henry David Thoreau, asks for freedom of thought and personal integrity above all else: "Must the citizen even for a moment, or in the least degree, resign his conscience to the legislator?"[48] For Thoreau personhood precedes citizenship and a sense of justice precedes respect for law. Chafee, in addition to expressing the social interest of free speech as the attainment of truth, also realized that there was an important individual interest in "the need of many men to express their opinions on matters vital to them if life is to be worth living. . . ."[49] More recently, the philosopher Sidney Hook, in the context of asserting that some rights are more important than others, says that the "right to pursue the truth has a prima facie validity because of its inherent qualities of delight and dignity as well as its beneficial consequences. . . ."[50] And Laurence Tribe, the preeminent contemporary constitutional law scholar asks whether freedom of speech is to be regarded as a means to an end only or also as an "end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be."[51]

There is a growing realization and reaffirmation of an idea that is

not new but whose antecedents can be seen in the thinking of Socrates, Milton, Mill, and beyond--intellectual freedom is valued both for its political and social importance as well as for the role it plays in individual development and delight. It is valued as a means to the discovery of truth and to effective self-government, and as an affirmation of the value of human dignity and personality--it is valued because "the unexamined life is not worth living."[52]

CHAPTER II

FREEDOM OF SPEECH, AMERICAN EDUCATION, AND THE COURTS

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.
>
> Justice Abe Fortas
> Tinker v. Des Moines (1969)

Introduction

Since freedom of speech is regarded as significant both to the development of intellectually and emotionally capable individuals and to the development of a democratically constructed society, to say there is an intimate connection between intellectual freedom and education may easily be regarded as a truism. Before looking at the specific implementation of the principle of free speech in the public school setting as exemplified by the landmark decision in Tinker, the connection between the principle of intellectual freedom on the one hand and education and schooling on the other will be briefly reviewed.

I have chosen to draw liberally on the writings of John Dewey who, apart from having had perhaps the greatest influence on educational practice in this century, is widely considered to have been America's foremost philosopher and educational theorist. I have chosen to use Dewey's writings for two reasons. Dewey believed in the fundamental importance of intellectual freedom as a means and as an end; and he believed fundamentally in the power of human intelligence to resolve the complex personal and social problems that have beset modern societies such as our own. In fact Dewey considered individual liberty and the

use of intelligence to be the best elements of the liberal tradition.

> If we strip its creed from adventitious elements, there are, however, enduring values for which earlier liberalism stood. These values are liberty; the development of the inherent capabilities of individuals made possible through liberty, and the central role of free intelligence in inquiry, discussion and expression.[1]

Dewey echoes what for many is the heart of the liberal tradition--an abiding respect for individual human dignity, what one modern legal philosopher has called the individual's right to "equal concern and respect,"[2] and a belief in the possibility of the full development of individual capacities through intelligent and free inquiry. The definition and elaboration of these values and their connection to education will begin with a consideration of the nature of freedom in a general sense.

The Relationship of Intellectual Freedom and Education

John Dewey has pointed out that true freedom consists in more than the elimination of constraints--it is more than the negative freedom of the old liberalism. For Dewey the essential problem of freedom was to relate individual choice to effective action. He was not so naive as to think that choice was meaningful without an ability to effect material change. And choice could accomplish an increase in effective action only to the extent that it was intelligent.

> There is an intrinsic connection between choice as freedom and power of action as freedom. A choice which intelligently manifests individuality enlarges the range of action, and this enlargement, in turn confers upon our desires greater insight and foresight, and makes choice more intelligent. There is a circle, but an enlarging circle, or, if you please a widening spiral.[3]

To the extent that choice is informed by intelligence, it makes for

"better choice" and "better doing" on successive occasions.

Dewey was very critical of both the orthodox theory of free will and the classic theory of liberalism for conceiving of freedom as something antecedently given. For Dewey, freedom was a possibility--a potentiality to be realized through intelligent action. As Dewey puts it:

> Our idea compels us. . . to seek for freedom in something which comes to be, in a certain kind of growth; in consequence, rather than in antecedents. We are free not because of what we statistically are, but in as far as we are becoming different from what we have been.[4]

The potentiality of freedom can be realized through the medium of freedom of thought or intellectual freedom which, although not a sufficient condition, was for Dewey "the very heart of actual freedom."[5] But freedom of thought is not separable from freedom of speech and writing. Nor is the idealistic notion that freedom of thought could exist, even theoretically, without free speech a reasonable one. Dewey explains the connection between speech and thought and how thought develops through interaction:

> It has often been assumed that freedom of speech, oral and written, is independent of freedom of thought, and that you cannot take the latter away in any case, since it goes on inside of minds where it cannot be got at. No idea could be more mistaken. Expression of ideas in communication is one of the indispensable conditions of the awakening of thought not only in others, but in ourselves. If ideas when aroused cannot be communicated they either fade away or become warped and morbid. The open air of public discussion and communication is an indispensable condition of the birth of ideas and knowledge and of other growth into health and vigor.[6]

As the term "intellectual freedom" is used in this paper (sometimes interchanged with freedom of speech broadly considered), it is meant to

be understood as an active process which includes the ideas of freedom of discussion, writing, and thought. It includes the possibility of manifesting the results of these activities in intelligent choice, observing the consequences, and choosing better the next time. Intellectual activity which is free does not simply emerge with the removal of restraints. It is an active accumulation of power to act in accord with reasoned choice. And it is facilitated by material conditions which encourage this freedom.

John Dewey, among many others, was well aware of the importance of social institutions in promoting or hindering the development of freedom, and felt that the most important problem of freedom was whether social conditions effectively promoted the development of judgment and insight. As far as public schools were concerned, Dewey said that "even our deliberative education, our schools, are conducted so as to indoctrinate certain beliefs rather than to promote habits of thought."[7] Since for Dewey the possibility of freedom has to be actualized through interaction with material conditions, he says that the "question of political and economic freedom is not an addendum or afterthought" but vitally necessary to personal freedom.[8] He felt that this was also the case with other social conditions and institutions, especially educational ones.

> A genuine energetic interest in the cause of human freedom will manifest itself in a jealous and unremitting care for the influence of social institutions upon the attitudes of curiosity, inquiry, weighing and testing of evidence. I shall begin to believe that we care more for freedom than we do for imposing our own beliefs upon others in order to subject them to our will, when I see that the main purpose of our schools and other institutions is to develop powers of unremitting and discriminating observation and judgment.[9]

It is important to note here that Dewey often draws a distinction between education and schooling that will be generally accepted throughout this paper. Education is much broader than schooling, aiding the process of cultural transmission and reconstruction in many informal ways. Formal education or schooling, on the other hand, is always a purposive and hence moral undertaking. Dewey considered schooling necessary to aid cultural transmission and reconstruction in complex societies, but felt that its power was relatively small when compared to informal methods of education.[10] As far as intellectual freedom is concerned, the position taken here is that it is equally necessary to education considered in this informal sense as it is to the more formal enterprise of schooling. For most purposes, therefore, no distinction will be made between schooling and education. When it is made, the reason will be clear from the context.

At this point it is appropriate to turn from the nature of freedom in general and intellectual freedom in particular to the connections that can be drawn between them and the avowed purposes of education, both formal and informal, in the United States. It will be assumed that intellectual freedom, following Dewey's analysis, is understood as freedom of thought, speech, writing,and action that enables individual growth and social evolution or betterment. If the purposes of schooling are consonant with this process, then at least one connection will have been made.

It easily could be argued that a major goal of public schooling (whether accomplished or not), as well as the primary justification for compulsory education in our society, is that it prepare students for

intelligent participation in a democratic society. This is reflected in the language of leading Supreme Court cases where the purposes and values of education are discussed. In Brown v. Board of Education, for example, the Court stresses the importance of education and gives some ideas as to the avowed purpose and justification of education.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship.11

Education is important to our society because to maintain freedom and independence, it is thought that individuals need to be educated for intelligent and independent participation in community life. This idea is elaborated in a relatively recent Supreme Court case, Wisconsin v. Yoder.

> [A]s Thomas Jefferson pointed our early in our history,. . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society.12

And in order to accomplish this goal of open, active, intelligent citizen participation in political and social life, constitutional freedoms for the individual student and teacher must be protected. Thus, education for citizenship is accomplished, in part at least, through practice. The Court in Board of Education v. Barnette discusses the importance of protecting student rights.

> That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms for the individual, if we are not to strangle the free mind at

> its source and teach youth to discount important principles of our government as mere platitudes.[13]

Education for citizenship is stressed in these decisions primarily because the state has the right to act for the general welfare and not merely for the welfare of an individual. But, although education for social participation is emphasized, it is nevertheless implicit that individual development is a necessary concommitant. The argument made in this paper is that individual growth and social evolution are inseparable and proceed together. As Dewey has said:

> Social cannot be opposed in fact or in idea to individual. Society is individuals-in-their-relations. An individual apart from social relations is a myth--or a monstrosity. If we deal with actual individuals, and not with a conceptual abstraction, our position can be also formulated in these terms: Education is the process of realization of integrated individualities. For integration can occur only in and through a medium of association.[14]

It is at this point that Dewey's thinking is again relevant for the further elaboration of the nature of education and for its connection to intellectual freedom.

Dewey believed that education was a necessity of life. It provides for social and individual adaptation to the world as well as for control and adaptation of the environment to meet human needs. Dewey felt that education had no end beyond itself. "Since in reality there is nothing to which growth is relative save more growth, there is nothing to which education is subordinate save more education."[15] Dewey says that the "educational process is one of continual reorganizing, reconstruction, transfiguring."[16] His technical definition of education is an elaboration of this theme. "[Education] is that reconstruction or reorganization of experience which adds to the meaning of experience,

and which increases the ability to direct the course of subsequent experience."[17] Although it may seem that Dewey conceives of education and growth here in formal terms, their moral nature--the requirement of betterment, progress, and ever-greater human meaning--can be seen in the entirety of Dewey's educational philosophy.[18] Dewey makes clear that a society which values betterment--change that will improve social and individual life--will have different purposes, materials, and methods of education than a society which strives to maintain the status quo.

Deliberate, purposive education is especially necessary to democratic communities, according to Dewey, precisely because they are interested in intelligently directed growth. Dewey said that "[i]f we are willing to conceive education as the process of forming fundamental dispositions, intellectual and emotional, toward nature and fellowmen, philosophy may even be defined as the general theory of education."[19] The office of philosophy, of education, and of democracy as a way of life is continual reconstruction and renewal.

Openness and intellectual exchange are necessary to renewal. According to Dewey, language and communication are particularly important in this process because they effectuate a sense of community and allow, in turn, for individual growth. "To be a recipient of a communication is to have an enlarged and changed experience. . . . Nor is the one who communicates left unaffected."[20] This process of renewal is both individual and social, and freedom of communication is an end and a means in turn. As Dewey says, "A progressive society counts individual variations as precious since it finds in them the means of its own growth. Hence a democratic society must, in consistency with its ideal,

allow for intellectual freedom. . . ."[21] In a society professing democratic values, freedom of intelligence is not only a vital means in the project of deliberative education but an end in itself and a moral imperative. As Dewey concludes: "The only freedom that is of enduring importance is freedom of intelligence. . . ."[22] In the section which follows the contemporary Supreme Court case which serves as the watershed for intellectual freedom in public schools will be considered.

The Case of Tinker v. Des Moines

It was not until 1969, in the case of Tinker v. Des Moines Independent Community School District, that the Supreme Court of the United States declared that students are persons and that both students and teachers retain their constitutional rights while in school.[23] It was a few years earlier, in 1965, that John Tinker and several other students were suspended for peacefully and symbolically protesting the war in Vietnam by wearing black armbands to school. Almost fifteen years later, John Tinker recalled how he had felt about the issue of students' constitutional rights in the mid-1960's. "I didn't realize before we wore the armbands that it wasn't established that we were citizens and would have all the constitutional freedoms. . . ."[24] The freedoms that John Tinker had taken for granted certainly and most fundamentally included the full range of First Amendment rights to freedom of speech, writing, and association. In fact, the Tinker case affirmed the right to engage in symbolic acts for communicative purposes--the right to free symbolic speech, sometimes thought to have been a less protected form of speech than so-called pure speech. And while the Tinker case did not

develop in a vacuum, it was a particularly forceful assertion of rights that may indicate a new approach to thinking about the rights of young people in general and about the purposes and methods of pre-collegiate education. A bit of historical background will help to place the Tinker case in perspective.

It was not uncommon in the early part of the century to think of children as mere creatures of the state or as simple possessions of their parents. This was the result of a trend which began three centuries earlier and which has had an influence that is still evident. Although today we live in a world where the notion of a long childhood is commonly accepted, the concept of childhood probably did not come into being for western societies until the seventeenth century. Before that time there was a short period of infancy after which the child entered directly into the affairs of the adult world. In the seventeenth century, religious orders began to teach parents to care for and protect their children. The family took on a moral and spiritual function and the modern concept of schooling began to develop. As the historian Philippe Aries says, "Henceforth it was recognized that the child was not ready for life, and that he had to be subjected to special treatment, a sort of quarantine, before he was allowed to join the adults."[25]

In addition to whatever beneficial consequences the idea of childhood might have produced, it is perhaps this protective, paternalistic notion that has contributed to the tendency, until recently, to dismiss the rights of the child completely or to subsume the child's rights under those of the parent or the state. Whether for humanitarian motives or for socio-economic reasons, the notion of the child's incapacity,

inadequacy, and dependency has been the rule rather than the exception throughout most of the twentieth century. And in addition to dependency, there is the additional notion that the child is duty-bound to the parent. Blackstone wrote that "[t]he duties of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honor and reverence ever after. . . ."[26]

These twin notions of dependency and duty led to the development of a legal philosophy which places great emphasis on parental and state power vis-à-vis the child. This power is reflected in a much quoted nineteenth century Pennsylvania case: "The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so."[27] The idea that the state must step in if the parents do not protect the child is an early American reiteration of the idea of parens patriae, which developed in the English common law and was applied to children in the case of Eyre v. Countess of Shaftsbury.[28] The case analogized the dependency of children to that of lunatics, saying that the king had a duty to protect both.

Although it is certainly true that children do need variable amounts of care and guidance depending upon their level of development and maturity, until very recently it has been thought that the legal rights of children have been severely limited or non-existent as a consequence. Even in 1972, Justice Douglas had to disagree with a majority opinion of the Supreme Court which held that the only interests at stake in a leading case concerning students were those of the state and the parents.

In considering whether the state could compel the high school attendance of Amish children against the wishes of their parents, Douglas says: "Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views."[29] That this expression of entitlement for children was confined to a dissenting opinion is one indication of why the earlier Tinker case can be considered a watershed not only for pre-collegiate intellectual freedom, but for the rights of children in general. But even in Tinker the vindication was not complete. Justice Black, in a devestatingly sarcastic dissent, envisions students all over the land exercising their newly won freedom by "running loose, conducting break-ins, lie-ins, and smash-ins."[30]

> The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.[31]

From this passage, it can be inferred that Justice Black's educational philosophy is relatively traditional. As the Tinker case is examined in more detail it will become increasingly clear why Justice Black, whose constitutional philosophy often had the effect of expanding the protection of civil liberties, appears here in a dissenting role.

The actions of John Tinker, fifteen years old, his sister Mary Beth, thirteen, Chris Eckhardt, sixteen, and other students took place against a background of war and in the middle of a decade that is noted for its social turbulence. President John Kennedy had been assassinated, the

civil rights movement was well underway, and the nation was deeply involved in the increasingly unpopular, many said immoral, war in Vietnam. According to John Tinker, the idea of wearing armbands occurred to a small group of people from the Des Moines area who were returning from an antiwar rally in Washington in November of 1965.

> On the way back on the bus there was a discussion of what we could do to express our concern with the war in Vietnam. It was agreed that we should write our senators and congressmen. We also decided to hold meetings at churches, bring in informed speakers, and provide literature so that people could find information otherwise not easily available. It was also suggested that we could wear black armbands as a constant public statement that we were against the killing in Vietnam.[32]

When school principals in Des Moines heard about the intentions of some students to wear armbands to school, they met and adopted a rule against such actions. According to John Tinker, it was his father, a Methodist minister who worked for the American Friends Service Committee, who felt that any move to defy the authority of school officials should be a "most considered action."[33] Perhaps because of his father's influence John Tinker was not among the first group of students to be suspended--he was waiting to discuss the new rule with school officials. It was only when school authorities refused to talk with him about the situation that John felt justified in wearing his armband in contravention of the rule. He, too, was suspended.

It was not long after John Tinker's suspension that the Iowa Civil Liberties Union became interested in the issues involved and filed suit alleging that the students' right to freedom of speech had been violated. The United States District Court upheld the suspensions, echoing a philosophy of education and an attitude toward children that is protective

and paternalistic. It is also a philosophy that values order above the free speech rights of children.

> School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the court.[34]

Although the District Court recognized that the wearing of armbands for expressive purposes is the type of symbolic act that is protected by the Free Speech Clause of the First Amendment, it expressly declined to follow the reasoning of a case decided in the same year by the United States Court of Appeals for the Fifth Circuit. In that case, Burnside v. Byars, high school students were permitted to wear "freedom buttons" unless evidence showed that the action would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[35]

Following initial defeat, the Tinker case was appealed. The lower court decision was affirmed by the United States Court of Appeals for the Eighth Circuit.[36] More than three years after the original student suspensions, the United States Supreme Court reversed the decisions of the district and appeals courts in the Tinker case. The Supreme Court chose to use the words of the Burnside case in protecting student speech. It held that unless evidence is presented that the speech would materially and substantially interfere with ordinary school functions or with the rights of others, it must be protected.

The mode of constitutional analysis that produced the Tinker decision is generally referred to as balancing. It involves weighing or balancing the rights of the plaintiff in situations where various rights

have come into conflict. This mode of analysis varies greatly from a very permissive, non-structured, ad hoc approach, where no particular rights or values are presumptively preferred, to balancing within a particular framework or with certain explicit guidelines. It has been said in many cases that freedom of speech occupies a preferred position among other rights and values because of its importance for the continuation of a democratic system.[37] But even though freedom of speech may be preferred in a general sense, this does not mean that other important rights and values, such as the right to privacy, for example, might not override the right of a particular person to express his opinions in a given situation or context.

Balancing the values of free speech with other important values can also occur with the aid of tools which help to implement the values in a more orderly fashion. The tool which has had the longest history of continuous use in resolving issues of freedom of speech, especially in situations where public order or national security are threatened, is the clear and present danger test, introduced in 1919 by Justice Oliver Wendell Holmes.[38] The understanding of what is necessary to prove a clear and present danger sufficient to prohibit or prevent speech has evolved over a period of fifty years to its present doctrinal synthesis. In 1969, in the case of Brandenburg v. Ohio, the criminal conviction of a Ku Klux Klan leader who had spoken at an organizers meeting was reversed. The Court said:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[39]

The opinion of the Supreme Court makes it clear that one must look to the words of advocacy to see if they are, in fact, couseling lawless action. But, even if that be the case, a harmless inciter cannot properly be convicted under this test. The contextual situation in which the advocacy occurs must be examined to see if there is evidence that the unlawful action is imminent.

In 1969, the year of the modern formulation of the clear and present danger test, an analog to that test appeared in the Tinker case. As the cases which have followed Tinker are examined, comparisons and contrasts will be made between the use of the clear and present danger test and the material and substantial interference test. Does the material and substantial interference requirement of Tinker protect the harmless inciter? Will speech that does not threaten imminent and serious interference with school activities be protected? And can speech be prevented if it poses a material and substantial interference even though the speaker is in no way attempting to incite disorder? These questions and others will be dealt with in the three chapters which follow, but before leaving the Tinker decision, several important dicta which are necessary to a more complete understanding of the case will be considered.

The first substantive point that the Supreme Court makes in the Tinker case is that when the students wore black armbands in order to publically express their views, they were engaging in the "type of symbolic act that is within the Free Speech Clause of the First Amendment."[40] This makes the point that actions which are intended to communicate ideas are, as the Court put it, "closely akin to 'pure speech'."[41] They are therefore entitled to protection that, if not

exactly the same, is at least nearly as comprehensive as the protection afforded pure speech.

It has been very popular historically in free speech cases to try to make the difficult, or perhaps impossible, distinction between speech and action. This grew out of the absolutist (and literalist) mode of constitutional interpretation that is generally thought of as an alternative to the balancing approach. Justice Black's name has been most closely associated with this strict constructionist position that would interpret the words and the meaning of the First Amendment literally. Since the First Amendment says that "Congress shall make no law. . . abridging the freedom of speech or of the press. . .," the words of the amendment themselves account for Justice Black's famous assertion that "no law means no law." He might have added that "speech means speech" and not action. This position, if accepted, would not only abrogate what are generally considered to be reasonable laws against defamation, for example; but it would also prohibit the kind of expressive behavior that occurred in the Tinker situation. Neither wearing armbands nor picketing would be protected by the First Amendment free speech provision, according to Justice Black. "Marching back and forth, though utilized to communicate ideas, is not speech and therefore is not protected by the First Amendment."[42] It is ironic that one of the greatest defenders of civil liberties has been so inflexible in the application of his absolutist philosophy that it is made to seem unduly conservative instead of the progressive, protective tool that he undoubtedly desired.

It can be argued, based on the previous discussion, that the majority opinion in the Tinker case is relatively progressive in at least two

ways. First, while recognizing that the rights of many different people were implicated in the particular situation, something more than a permissive, ad hoc balancing was employed to resolve the conflict of rights. The material and substantial interference test was developed as a tool, and speech was held to be entitled to comprehensive (one might even say preferred) protection. The burden was placed on school officials to demonstrate not a reasonable need but a compelling need to justify the prohibition of speech. Secondly, the absolute distinction between speech and action was implicitly rejected. The lines which separate pure speech, symbolic speech, speech plus (speech plus action), and action are extraordinarily difficult to draw and perhaps not as useful or speech-protective as had been assumed. The focus has now appropriately shifted to the communicative impact of the speech and to the nature of the surrounding circumstances.

In addition to the general type of constitutional analysis employed in the Tinker case, several statements were made by the Court from which a progressive general philosophy vis-à-vis education and constitutional values can be inferred. The dictum that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" indicates a freedom-promoting educational philosophy as well as reaffirming that all citizens, including students in school, retain their constitutional rights despite the various roles they may assume.[43] And this is not merely stated, but stressed. Neither an "undifferentiated fear or apprehension of disturbance" nor a "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" are sufficient to overcome the right to freedom of

expression.[44] The Court emphasized that students are "persons" and that they, too, possess "fundamental rights" which must be respected by school and state officials. They may not be regarded as "closed-circuit recipients" of whatever the state decides to communicate but must be free to express their own opinions both inside and outside of the classroom. Freedom of speech is an important right that must be cultivated and not merely tolerated in principle.

On the other hand, the Court realized in its process of weighing and balancing that students should not be allowed to exercise their rights in a way that would substantially interfere either with the rights of others or with normal school operations. It could be argued that the Court was interested in school order and proper decorum per se and not in the fact that a material and substantial interference would burden the rights of other students. The entire focus of the opinion seems to contradict this conclusion, however. From the Court's emphasis on the importance of free speech, one might infer that order is necessary because it facilitates the purposes of education, one of which is intellectual freedom. Justice Fortas, who wrote the majority opinion in Tinker, uses a long quote from Justice Brennan's opinion in Keyishian v. Board of Regents to demonstrate the importance of free speech and education to the discovery of truth and to the future of the nation.

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." [citation omitted] The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas

> which discovers truth "out of a multitude of tongues,[rather] than through any kind of authoritative selection."[45]

The Court stresses that the school is a "public place"--a free, open, non-authoritarian "marketplace of ideas." But there is no suggestion that the Court conceives of school as a place for break-ins and smash-ins, as Justice Black feared. It is a place where state and school officials have "comprehensive authority" to act within constitutional limits, i.e., to act consistently with the fundamental constitutional rights of students and teachers. It is a place where freedom of speech is comprehensively protected when applied with due consideration given to the important purposes of education--one of which is the development of intellectual freedom--and to the unique characteristics of the educational setting. The spirit of Tinker is not permissive, but it is progressive. It is not activist in the sense of greatly increasing the evolutionary pace of constitutional analysis, but it is an important reaffirmation of the basic commitment of our society to the dignity of the individual and to the basic value of intellectual freedom. It does not represent an ad hoc, valueless approach to constitutional adjudication but a relatively careful weighing of competing claims in a context where important constitutional rights and educational purposes are at stake. Given the modesty of the opinion, it is to be expected that the progressive aspects of the Tinker decision will be found to be thriving in the Tinker progeny from 1969-1979. The three chapters which follow will examine cases which have arisen in this ten year period which are directly relevant to the issue of intellectual freedom in public schools.

CHAPTER III

THE STUDENT'S RIGHT TO SPEAK AND TO KNOW

> The First Amendment involves not only the right to speak and publish, but also the right to hear, to learn, to know. And this Court has recognized that this right to know is "nowhere more vital" than in our schools and universities.
>
> Justice William O. Douglas, dissenting from the denial of certiorari in Presidents Council v. Community School Board (1972)

Introduction

The previous chapter was largely devoted to an explication of why First Amendment rights are important in public schools. Once educational institutions are recognized as a special marketplace of ideas, it becomes necessary to take a closer look at how First Amendment rights are "applied in light of the special characteristics of the school environment," as the Tinker case adminishes they must be.

These special characteristics can be reduced to two propositions--one looking toward the school as a learning environment and the other toward the student. The school has a unique purpose. Unlike the home, a public library, or a park, its purpose is neither recreation nor relaxation but rather teaching and learning. The first proposition, therefore, is that the school environment must be maintained so as to promote teaching and learning. The second proposition derives from the fact that the school has a unique clientele--students. Students are most surely citizens, but at the elementary and secondary level they are a captive audience, compelled by law to attend school. Students are

also less mature than most adults physically, emotionally, and intellectually. Thus, the second proposition is that the developmental level of students must be considered in order to provide optimal educational opportunities.

Because of the avowed educational purpose of public schools and because of the captive, immature clientele, the state in the person of local school officials owes a duty to these students which demands special knowledge and extraordinary powers of judgment. School officials must actively seek to promote a climate where freedom of expression, learning, and growth can flourish; and yet they must discourage or prohibit licentious speech and other behavior that interferes with the educational purpose or with student constitutional rights. School officials can neither be overly permissive nor can they unduly censor or impede. Everyone who is active in public education, whether students, teachers, school officials, or parents, must try to enhance the possibilities for student growth and development in keeping with the unique purpose of schooling. The state police power, which is used to provide for the health, safety, and welfare of all people, can only be used legitimately in the educational context to promote the emotional, social, and intellectual growth of the students as individuals and as citizens.

This chapter is concerned with situations where students, and others on their behalf, have asserted the right to speak and not to speak, to know and not to know in the post-Tinker period. Cases where speech is not protected because it is intertwined with disruptive action will be contrasted with cases where speech is protected. The right to know will be examined with regard to access to books, outside speakers, and

specialized courses. The right not to speak will be illustrated primarily by the flag salute cases. And finally, the right not to know or to privacy will be illustrated by cases which have sought to protect the emotional development of students. The purpose will be to see if these rights have been protected and how they are accommodated to other rights and interests.

Student Speech: Protected and Not Protected

The Supreme Court, in the Tinker case, affirmed that students retain their constitutional rights while in school, but it also held that these rights cannot be absolute in school any more than they can be absolute in the public forum and that expressive conduct will not be protected in school situations where because of time, place, or type of behavior the conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[1] Even conduct which is clearly expressive but which is intertwined with materially disruptive conduct will not be protected. Thus where black berets were "used by the plaintiffs as a symbol of their power to disrupt the conduct of the school," and where the plaintiffs had walked in the school halls shouting "Chicano power" and had blocked hallways, the students were held properly suspended for their disruptive conduct.[2] The Tinker case was distinguished on the issue of material and substantial interference. Another case where Tinker has been distinguished on this issue involved a walkout where students left campus and attempted to persuade others to join them when a grievance had not been successfully resolved.[3] The court held that students did not have the right to assemble at just

any time and place.

Although shouting, blocking hallways, and walkouts will not often be protected in a place devoted to teaching and learning, what is lacking in these cases and in some of the ones which follow is an explicit finding that this behavior has created a material interference. The issue of degree should always be considered--even in the most obvious cases. What is required by Tinker is a material interference, not just any interference or disruption. The definition of what constitutes a material interference will be developed from a consideration of the cases.

At times, criminal penalties have been imposed on students who have engaged in non-protected conduct in violation of legitimate, official directives. In one case where students refused either to go to class or leave the school grounds after a three hour protest demonstration, the students were held properly convicted of unlawful trespass.[4] This case illustrates the type of conduct which, although intended to express the message of student displeasure with eight previous student suspensions, is not protected by the First Amendment. The students cheered, shouted, and sang; successfully urged others who were in classes to join them; and raided the school cafeteria removing chairs and a desk to the protest site. As the demonstration got noisier it became difficult or impossible for teachers who were engaged in classes to be heard. In this case a finding was made that the protest demonstration was "unduly disruptive" of the educational process.

In another criminal case, five high school students were convicted of disorderly conduct for their actions in attempting to organize a

student walk-out.[5] Although here the conduct involved only five students and in the prior case it involved twenty-five to thirty, and the only misconduct mentioned was singing and shouting on the playing field which caused some students to come to the windows, the court held that the Tinker case was not applicable because the issue was physical disorder and not speech. The court here seems confident that it can distinguish speech from action. The more speech-protective approach would be to first recognize that much action is intended and perceived as expression, and then to determine whether or not it is protected speech by applying the appropriate test. It might be argued that this approach is especially necessary when criminal penalties are likely to be imposed rather than in-school remedies.

Other ways that speech which is arguably protectable is being dealt with by the courts are illustrated by the following cases. One Federal District Court held that a school regulation requiring an automatic suspension for engaging in boycotts, sit-ins, stand-ins, and walkouts was overbroad because it was not limited to those activities which created a substantial interference rather than a mere distraction.[6] However, the case was reversed on appeal, the implication being that all sit-ins, etc., are per se not protected by the First Amendment.[7] This same result can be reached by applying school rules which prohibit "willful disobedience," "intentional disruption," and "immoral or vicious practices," to uphold punishment of students for walkouts and boycotts.[8] The court can merely apply a gloss that such rules are intended to regulate behavior which is not expressive and therefore avoid addressing the issue of whether or not such regulations are so vague as to

infringe protected First Amendment speech activities.

By presenting the above illustrations, I do not mean to suggest that such expressive behavior in public schools should necessarily go unregulated. What I do believe, however, is that when such cases are critically examined it can be seen that illusory speech/action distinctions are being maintained in derrogation of possibly protected First Amendment speech activity and that the degree of disruption necessary to lawfully prohibit expressive conduct in schools is often assumed rather than specifically found as judicial fact. The cases which follow, in contrast to the previous ones, are more speech-protective. They concern student speech which has been protected by the courts and some of the methods that have been employed to effectuate that protection.

It is interesting to note that the Fifth Circuit, which includes Texas and most of the southern states, has, at times, been a leader in protecting the free speech rights of students in public schools. Burnside v. Byars, from which the material and substantial interference test of Tinker was taken, is a Fifth Circuit case;[9] and the two cases which follow originated in Texas. Butts v. Dallas Independent School District arises out of incidents surrounding the Vietnam moratorium of October 15, 1969, which the court said "may end up as a footnote to history but. . . was tremendous in anticipation."[10] Shortly after students in the Dallas district decided to wear black armbands to protest the war, Dr. Estes, the district Superintendent of Schools, decided that such action would be disruptive. Pursuant to a policy, improvised for the occasion, students were prohibited from wearing armbands in school on the appointed day as well as thereafter. Relying

heavily on Tinker, the Fifth Circuit Court of Appeals granted an injunction in favor of the students. The court said that "even in the school environment. . . something more is required to establish [a] disruption than the ex cathedra pronouncement of the superintendent. . . . [T]here must be some inquiry, and establishment of substantial fact, to buttress the determination."[11] Even though the school officials rightly concluded that there would be disruption on October 15th, according to the court they needed to show evidence that the black armbands would be the cause and that to prohibit them would eliminate or meliorate the disruption. The court added that even when school officials are confronted with the possibility of disruptive activity, "the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative."[12]

This case represents anything but the old deferential approach to decisions made by school administrators. It is more consonant with the recognition that students have important constitutional rights which, perhaps because they are a captive audience, school officials have a special duty to "nurture and protect." Speech can be suppressed, according to this case, only when there is a reasonable apprehension of a material disruption based on fact, and there is no practical alternative to the suppression.

The other Texas case concerns five Mexican-American students who sought an injunction against a school rule prohibiting "apparel decoration that is disruptive, distracting, or provocative" which was promulgated one day after the plaintiffs first wore brown armbands to

school.[13] The students intended to express their support for the criticisms of certain educational policies and practices that had been put forth by a community group called "Concerned Mexican American Parents." Citing the Tinker case as controlling, the court issued an injunction saying: "There has been no showing that the wearing of the armbands. . . would materially and substantially interfere with the requirements of appropriate discipline or be disruptive of normal educcational functions."[14] And this result was reached despite the fact that there had been isolated incidents of unrest and apprehension, including one instance of several girls trying to force another girl to wear an armband and one instance where a father kept his children out of school because he was afraid there might be trouble. The court also rejected the opinion of school officials that wearing armbands in violation of school policy was a disruption per se.

A case which illustrates another way that courts have protected student expression involves students who were suspended for picketing and using loudspeakers outside school.[15] There was a school rule which prohibited participation in pickets on school grounds "if they affect the institutional order," and using loud speakers outside school "if the institutional order is affected." Although these particular students might have been properly punished if the rule were constitutionally drawn, in order to prevent a chilling effect on the speech of others, the court held the rule void on its face for vagueness and overbreadth. The rule is vague because the meaning of "affect the institutional order" is unclear. People of ordinary intelligence would have to guess at its meaning. And it is overbroad because time, place, and manner of pickets

and loudspeakers can only be regulated according to the special needs of an educational institution. A total ban would overreach constitutional limitations by taking in protected speech, i.e., speech which did not create a material and substantial interference with school discipline. The overbreadth issue in this case was decided by reference to the standards announced in Tinker.

The Tinker case has also been used as precedent on both sides of the issue in cases which arise when a racial majority asserts its right to freedom of expression in a way that is personally offensive to a minority group. In cases of this type freedom of speech of the majority has been protected unless it violates the Tinker disruption limitation or unless it is exercised by a state authority in such a way as to violate the rights of others to equal protection of the laws. In an integrated Florida school where eight per cent of the students were black, a Federal Dsstrict Court enjoined both the officially sanctioned and the private use of symbols of the Confederacy.[16] The court found that these symbols, which included the Confederate Flag for example, were a "significant contributing cause" of violence, disruption, and continued racial tension which impeded the development of a unitary system. Since the school officials were under a desegregation order they could be enjoined from using these symbols in order to foster a unitary system. White students who asserted their personal First Amendment right to continue to use the symbols were enjoined based on the Tinker test of a material and substantial interference with school discipline. Some students had used the symbols provocatively and there had been four massive interracial confrontations at the school.

Two years later when school officials and some white students used the Tinker case as precedent to appeal for relief from the permanent injunction, the Court of Appeals remanded the case to see if the injunction was still necessary in view of the free speech rights of the majority of students.[17] While the Tinker test had been used to support prohibition prohibition of speech in the past, based on a material interference; it was now being used to support the majority's claim to freedom of expression--even if that expression was distasteful to others. The issues involved in these cases are especially difficult. Two rights of fundamental importance come into potential conflict--the majority's right to freedom of speech and the minority's right to equal protection of the laws or perhaps to the right not to hear.

In Banks v. Muncie Community Schools, a Federal Circuit Court of Appeals took a relatively wooden approach to this problem.[18] Although the lower court had recommended the elimination of symbols which were personally offensive to a significant number of students, the appeals court held that the use of the term "Rebels" for a school name, Southern Aires" for the glee club, and "Southern Belle" for the homecoming queen were protected by the First Amendment. These symbols had been adopted by student vote several years earlier. While it is probably true that the black students' right of free speech was not violated, as the court held; it is at least arguable that their right to equal protection was being violated even though there was no affirmative, official, physical blocking of access to school facilities and programs.

The result in the Banks case might be explained by the fact that it arose in an Indiana school system where there had been no court finding

of a denial of equal protection. A Louisiana case can be profitably compared. In Smith v. St. Tammany Parish School Board, plaintiffs, who were minority students, moved for a modification of a desegregation order to enjoin the use of the Confederate Flag and other indicia of racism.[19] The suit was motivated, in part, by the fact that the principal of Covington High School displayed the battle flag in his office next to the American flag and the flag of Louisiana. The court barred symbols of racism from official use by the school board and its employees. Since these symbols signified resistance to integration, their official use could be banned in order to foster a unitary school system by ending official discrimination. At the same time, the court held that individual students could use these symbols, presumably based on their right to freedom of expression.

The most troubling issue of relevance to free speech arises in the first two of these school symbol cases, particularly in the Florica case on appeal.[20] It would be hard to argue that individual students should be denied the right to speak freely, even if offensively, absent a material and substantial interference that could not be controlled in some other way. But the suggestion by the Court of Appeals in the Florida case that the students should be allowed to exercise their right to freedom of expression by choosing racially inflammatory school symbols for at least semi-official school use is difficult to understand. In that case there had definitely been a material interference with school discipline in the past--four massive interracial confrontations. But even assuming that the threat of material physical disruption was no longer an issue, it could be argued that these officially sanctioned

symbols interfered with the rights of other students to equal educational opportunity in a material and substantial way. It is at least arguable that judicial decisionmaking need not be so wooden that interference with the social and emotional development of minority students who are forced by law to attend school cannot be prohibited. The notion of a material and substantial interference need only be expanded to include more than mere physical violence, as has been done in several cases to be considered later. The Tinker test would allow consideration of the emotional and social needs of the students as well as their intellectual and physical needs. These minority students may even have a First Amendment speech right not to hear, an issue to be considered later.

The right to freedom of speech should not be lightly overcome. Even the American Nazi Party and the Ku Klux Klan retain their right to a type of speech which is extraordinarily offensive to many people. The Tinker test provides a way to balance these competing rights, along with the interest in a quality education, in a school setting where relatively less mature individuals are required to attend for educational purposes. In some of these school symbol cases the affirmative right to speak may have to yield.

The following group of cases is representative of situations where student free speech rights were not protected by the courts but where they arguably should have been. In the first case the court simply failed to see any First Amendment issue. In the next three cases the reasonable forecast of a material and substantial interference is inferred from a generalized tense situation in other places, from the fact of integration itself, or from the fact that the student body consisted

of students from military and non-military families. In the last three cases the evidentiary facts as they are presented in the opinion appear to be less than sufficient to support a conclusion of material and substantial interference as required by Tinker, and the necessary degree of disorder is generally not considered.

In a Pennsylvania case, a group of high school students wore armbands to graduation reading "Humanize Education."[21] Subsequent to graduation school officials decided that letters would be written informing the colleges to which plaintiffs had applied for admission that they had worn armbands to commencement "even though they had been requested not to wear any insignia which deviated from the formal graduation attire."[22] The students sought an injunction against this action. Although the court recognized that wearing armbands to express opinions was protected by Tinker, it held that here there was no question of official interference with freedom of speech because school officials were merely conveying factual information to the colleges. Of course college admission officials might recognize that the students had engaged in expressive activity protected by the First Amendment, but these students should not have been forced to wager their future education that the uncooperative implication of the letter would be rejected. An additional and perhaps more disconcerting effect of such a non-protective attitude is the chilling effect on the future speech of younger students. The following case, in contrast to this one, shows school officials making at least a good faith effort to protect the students' right to freedom of expression.

In 1970, during a time when there had been strong public reaction

to the involvement of troops in Cambodia and just after four Kent State University students had been killed, the principal of a Pennsylvania high school disallowed the wearing of armbands with "strike," "rally," or "stop the killing" on them.[23] In an attempt to abide by the Tinker decision, the principal did allow colored armbands to be worn. Other armbands which "could have caused disruption of the educational processes in the senior high school" were prohibited because of the tense and uneasy situation, and students who wore them were suspended.[24] The degree of feared disruption was never mentioned by the court, and no evidence was reported of disruption in the particular school or in nearby schools. The court concluded, citing the Tinker case:

> The restriction was related to the potentially disruptive situation at the school at the time. . . . We feel that the limited restrictions imposed upon the students were reasonable and necessary. The refusal of a student to obey the reasonable requests in this case was insubordinate and unprotected activity.[25]

This case is a good illustration of an unusually deferential attitude toward the judgments of school administrators combined with a too ready acceptance of what is arguably undifferentiated fear. The citation of the Tinker case in support of the judge's conclusion is enigmatic. This action is precisely the type of "undifferentiated fear of apprehension of disturbance" which the Tinker court said was insufficient "to overcome the right to freedom of expression."[26] Citing the Supreme Court decision of Terminiello v. Chicago, the Tinker court says that we must take the risk of trouble, fear argument, and disturbance in order to protect freedom of expression.[27]

In a similar case a student was denied permission to distribute literature and suspended for wearing a button reading "April 5 Chicago; GI-Civilian Anti-War Demonstration; Student Mobilization Committee."[28] The recently integrated school's no-button rule was upheld in a paternalistic and protective opinion where the majority reads Tinker as implying that when a no-button rule is consistently enforced and where there may be "potential racial collision," there is no need to justify continuation of the rule based on a material and substantial interference. There may, indeed, have been sufficiently good factual support for upholding the relatively repressive and absolute no-button rule in a case where the school had recently become integrated. The problem is that the court does not critically examine the evidence. The case has been criticized by commentators for its uncritical assumption that the fact of integration per se can be used to support a reasonable forecast of substantial interference.[29]

Much can be learned about the process of judicial decisionmaking and about underlying judicial motivations and philosophies in this case by noting how students' rights are sardonically mocked:

> We will not attempt extensive review of the many great decisions which have forbidden abridgment of free speech. We have been thrilled by their beautiful and impassioned language. They are part of our American heritage. None of these masterpieces, however, were composed or uttered to support the wearing of buttons in high school classrooms.[30]

The opinion continues by expressing doubt as to the propriety of protecting the "colorful use of free speech" of which Justice Douglas spoke in Terminiello v. Chicago in school situations.[31] Douglas had written that one function of free speech was to induce unrest, to create

dissatisfaction with the status quo, and to stir people to anger.[32] Again, this was precisely the case upon which the Tinker court relied in demanding more than an undifferentiated fear to bar student speech. It is worth remembering that here a student merely wore a button announcing a demonstration, which prompted a few students to ask what the button said. The case seems to illustrate the triumph of a relatively authoritarian and repressive philosophy out of keeping with the more progressive approach taken by the Supreme Court in the earlier Tinker case.

In Hill v. Lewis, where a "tense" situation had developed, school administrators ordered that all students with armbands be removed from classes.[33] This action was precipitated by the fear of further polarization of opinion in a school where 40% of the students were from military families. The only disturbance reported in the opinion was the disruption of one class which occurred, ironically, on the day that school authorities summarily ordered all students with armbands barred from classes. There had been no prior announcement of this decision and there was no prior rule against the wearing of armbands. The court upheld the action because the no-armband order extended to all armbands and symbols equally and because the demographic situation allowed school officials to base their action on something more than undifferentiated fear of disturbance. This case again illustrates the erroneous assumption that Tinker held total bans justifiable per se, and it also fails to provide evidence that would show satisfaction of the Tinker disruption limitation.

It seems reasonable to conclude that something more than

undifferentiated fear or apprehension of disturbance was meant to require more than a conclusory opinion based on a generally tense situation, or on the possibility of factional discord inferred from racial integration or differing political views. If the fear was, in fact, legitimately differentiated, these opinions do not provide the kind of information that would be useful in allowing for such differentiation in the future.

The last three cases where student speech was not protected involve somewhat different issues. In one case an eighth grade student was suspended for the remainder of the term for wearing a pantsuit in violation of the rule that girls could not wear "any type of trouser garment" and for demonstrating against the dress code in violation of the policy against disruption.[34] The court held that even if wearing a pantsuit was intended as communication it was not protected because it violated a school rule. The court here seems to miss the point that if wearing pantsuits is communication (as in this particular instance of passive demonstration against the dress code it seems especially calculated to be), then the mere assertion that it violates a school rule is insufficient to say that it is not protected. Courts have generally ruled that not just any rule that interferes with free speech directly or indirectly is permissible. If it interferes directly it must be justified by some compelling state interest; if indirectly, by some reasonable state interest.

An alternative explanation for the result in the pantsuit case might be that the plaintiff's participation in a walkout demonstration was sufficient in and of itself to legitimate the punishment. Although there is some indication that the walkout did minimally interfere with

the classwork of the participants, the court did not find a material and substantial interference. It used the Tinker precedent only to the effect that acts which interrupt the "pedagogical regime" or are "disruptive of the educational process" or are "calculated to undermine the social routine" are not protected.[35] Although it is very likely that most such walkout demonstrations would indeed amount to a material and substantial interference; it seems that perhaps here, for example, where there was a limited and generally non-disruptive demonstration, the spirit of Tinker would call for affirmative efforts to accommodate the students' attempt to convey a message.

The same might be said of the next case where a high school student who had distributed and carried signs was suspended when he refused to give up a sign protesting the non-renewal of a teacher's contract.[36] The student asserted his free speech right to have the sign. The opinion indicates that there had been some physical disruption--chanting, pushing, and shoving. But this activity occurred only after Steven Karp, the leader of the demonstration, had been suspended.

Here there seems to have been no effort to accommodate the student's desire to indicate his displeasure with having lost a favorite instructor. But while justificatory facts do not appear in the opinion, the court at least makes a good faith effort to consider the principles derived from the Tinker case. After noting the difficulty in applying Tinker, the court says that there is no need to wait until actual disruption occurs. What is needed according to the court are "facts which might reasonably lead school officials to forecast substantial disruption."[37] The court realizes that the degree of disruption is relevant,

but indicates that the level of disturbance required is lower in a school situation than it might be in a public park, for example. That seems to be a correct interpretation of the Tinker principle that speech must be accommodated to the "special characteristics of the school environment." The only thing missing in this opinion is a detailed examination of the evidence upon which the forecast of a substantial disruption was made. Barring that, the reader cannot know if such evidence was available or if the court simply accepted the judgment of school administrators.

The last case in this group concerns a school rule that rallies not be permitted in the central quad.[38] The rule was based upon the fact that there had been four rallies in the last three years resulting in "disgraceful episodes" which caused disruption and one recent rally which had caused "disorder." It is not clear from the opinion how many rallies there had been all together in the last three years. The court held that where other "official" facilities for speaking were provided and where previous unauthorized rallies had resulted in disorder, the students need not be permitted to hold rallies in the central quad.

There are two possible problems with the court's opinion, the first being the familiar complaint that there was no finding of a reasonable forecast of a material interference with appropriate discipline. The court seems to conclude that mere disorder is sufficient. The second problem is that if this is considered an indirect restraint on speech, even neutral time, place, and manner restrictions must be reasonable. It is at least arguable in this case that where discussion was limited to "official" school clubs which met at a predetermined time, the

limitation was not reasonable.

As a footnote to these student speech cases, a few cases regarding student freedom of association might be considered to illustrate how this implied First Amendment freedom interacts with and supports the right to freedom of expression. In two of these cases the court held school regulations unconstitutional because they did not limit their regulation of associational activities to those activities that were materially and substantially disruptive. The rules in these cases prohibited recruiting members for political and religious groups and a prohibition of the formation of controversial groups.[39] Associational activities of students cannot be limited to coincide with the social or political tastes of school officials, and controversial speech is no less protected than other speech.

In another case illustrating these principles, the court held that the denial of recognition to a club, with the consequent loss of benefits including the right to distribute literature and to hang posters, presented a constitutional issue as substantial as that presented in the Tinker case.[40] The denial was based upon the prohibition of groups which express a partisan point of view--the group was to be called the "Redford Student Mobilization Committee." Although this case illustrates the proposition that school officials cannot prefer student organizations which express favored views, the following case shows that the proposition is more difficult to implement in situations where the First Amendment values of speech and religion come into conflict.[41]

In a California case, a voluntary student Bible study club which wanted to "prayerfully" study the Bible was prohibited from meeting on

school grounds during the school day in order to protect school officals from the charge of an unconstitutional establishment of religion.[42] As the dissent points out, citing Tinker, there may bery well be no state action involving establishment of religion when religious expression is simply treated like other expression. The major problem might be the possibility of unconstitutional state entanglement with religious activities. The ease with which the result was reached in this case can perhaps be explained because of the undervaluing by the court of the plaintiffs' right to freedom of expression and association and the fear that merely allowing a student club to function would lead to the charge of religious establishment. The issues are not easy to reconcile--all First Amendment rights, whether concerning religion or speech, have been held to be fundamental--but it is at least arguable that this case illustrates the judicial predilection to undervalue the importance of expressional rights when there is even a possibility that they might conflict with religious rights. By doing this, the court misses the opportunity to discuss the special importance of religious speech, and why it might be necessary to assure absolute separation in order to prevent state entanglement with religion. In the section which follows, the student's right to know will be introduced through cases dealing with access to library books.

The Library as a Marketplace of Ideas: The Student's Right to Know

When school board members remove books from public school libraries because they disagree with the social or political views expressed therein, the question arises as to whether any constitutional right is infringed. The cases considering this issue, which have arisen between 1972 and 1979, can be looked at in terms of whether they offer more or less protection to speech. The leading case for the less protective line of decisions is from the Federal Court of Appeals for the Second Circuit, Presidents Council Community School District v. Community School Board, decided in 1972.[43] This court holds that by removing books from a high school library the "intrusion of the Board. . . upon any first amendment constitutional right of any category of plaintiffs is not only not 'sharp' or 'direct,' it is miniscule."[44] The case was used as precedent and its reasoning closely followed by two cases from Federal District Courts in the Second Circuit which are now on appeal. These cases will also be considered.

The more speech protective branch of the library cases is typified by the leading case of Minarcini v. Strongsville City School District, decided in 1976, by the Sixth Circuit Court of Appeals.[45] This was the first case to declare that students have a First Amendment right to know, and to view the library as instrumental in this endeavor. "A library is a mighty resource in the free marketplace of ideas. It is specially dedicated to broad dissemination of ideas. It is a forum for silent speech."[46] The case has been followed by two influential cases from Federal District Courts in the First Circuit.

The Supreme Court has not yet ruled on the precise issues that have arisen in this line of cases, but if the Second Circuit continues to view these cases as lacking an appreciable constitutional issue, the problem might be considered by the Supreme Court. When various circuits are split on an issue of some importance, the Court will often agree to resolve the conflict. A closer look at these cases will begin to show their importance for intellectual freedom in the public schools.

The earliest case is Presidents Council, where the school board in Queens, New York, acting on a parent complaint, removed Down These Mean Streets from all junior high school libraries.[47] The book is a highly acclaimed autobiography of a Puerto Rican youth growing up in East Harlem, which contains sexually explicit passages that were offensive to some board members. When a conflict arose, the court held that because the book could be loaned to parents and because discussion of the book was not precluded, "there is. . . no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students or librarians."[48] Books do not acquire tenure on the shelf, and the shelving and unshelving of books, according to the court, does not present a constitutional issue.

> The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.[49]

The next Second Circuit case was Pico v. Board of Education, which also originated in New York.[50] In that case nine books were removed

from junior and senior high school libraries because they were irrelevant, immoral, vulgar and in bad taste, according to the school board. Concluding that it is the duty of the board to transmit primarily those values which are consistent with the basic values of the local community--the indoctrination or transmission theory of education--the court held that no First Amendment issue was involved.

A little later in the same year, 1979, the case of Bicknell v. Vergennes Union High School Board of Directors was decided in Vermont.[51] In this case the book The Wanderers, by Richard Price, was removed from the high school library because it was considered "obscene and vulgar." Dog Day Afternoon, by Patrick Mann, was removed to a special restricted shelf. Although the court said that a "library is a vital institution in the continuing American struggle to create a society rich in freedom and variety of thought,"[52] it dismissed the complaint as presenting only an "intramural strife" where basic constitutional rights had not been directly or sharply infringed.

Presidents Council and its progeny is in direct conflict with a second group of school library cases and arguably with an important line of First Amendment precedent left largely unconsidered by those cases. In the Minarcini case, an Ohio school board ordered Cat's Cradle by Kurt Vonnegut, Jr. and Catch 22 by Joseph Heller removed from a high school library.[53] In this case, which was decided four years after Presidents Council, the Sixth Circuit Court of Appeals held that students have a First Amendment right to know--a right to receive information and ideas. Once having created a library, the school board does not have the power to censor its contents based only on the social and political tastes of

its members. The right to know imposes constitutional constraints on the board's discretion with regard to censorship. Removal of books should be limited, according to the court, by fiscal restraints and proper educational considerations, e.g., providing a balanced presentation.

This case was followed by a District Court judge in Massachusetts in what is perhaps the strongest expression of constitutional protection against censorship in public school libraries. In Right to Read Defense Committee v. School Committee, a book of poems by young people called Male and Female Under 18 was removed from a high school library because board members felt that a poem it contained, "The City to a Young Girl," was "filthy" and "offensive."[54] The poem was written by a fifteen year old Brooklyn girl, expressing her feelings about being subjected to the lustful behavior of men while walking on New York City streets. The first few lines will illustrate why the poem might have been controversial.

> The city is
> One million horney lip-smacking men
> Screaming for my body.[55]

The court in this case did not read Presidents Council as requiring that school boards have complete discretion in removing books from school libraries. While Judge Tauro agreed that not every removal has constitutional implications, he suggested that if the motivation of those who remove is to censor because of their own social and political tastes, the action implicates First Amendment values. The court did not find that the book Male and Female Under 18 was obsolete, irrelevant, obscene, or improperly selected in any way. There was also no limitation

of financial resources. Citing the Tinker case, the court said that to justify removal of a book, there must be some "substantial and legitimate government interest."[56] Although the interest need not concern school discipline, some important and comparable interest must be at stake. Since there was no evidence that the book would have a harmful effect on students, and no other reason was given for legitimate removal; the court held that the censorship in this case violated the First Amendment right of students and teachers to read and to "be exposed to controversial thoughts and language."[57]

Just as Right to Read Defense Committee relied heavily on the leading Minarcini case, another case from the First Circuit relied on both Minarcini and Right to Read. Where a New Hampshire school board voted to remove MS magazine from the school library because of ads for contraceptives and materials dealing with lesbianism and gay rights, the court held that First Amendment values were implicated, thus requiring a substantial and legitimate governmental interest for removal.[58] It is interesting to note that the board later voted to return two issues of the magazine with the advertisements excised. In this case, Salvail v. Nashua Board of Education, the court noted that objective criteria such as obsolescence, architectural necessity, and legitimate educational considerations were not the motivating factors in removal. Since the political tastes of the board could not be constitutionally controlling, the court ordered the board to resubscribe to the magazine and to restore the back issues to the library shelf.

It is hard to imagine two more diametrically opposed positions than those followed by the Presidents Council line of cases and the Minarcini

line of cases. Part of the divergence may be accounted for by the fact that Minarcini and the cases which follow it pay particular attention to important lines of First Amendment precedent that have developed outside the school situation. Although it is certainly true, as Charles Alan Wright has persuasively argued, that free speech precedent from other areas of life cannot be transferred indiscriminately to educational settings; it is also true that they cannot be ignored.[59] There is a whole line of cases beginning in 1943 that protects the right to distribute and receive handbills in door-to-door solicitation, the right not to have prisoner mail censored because of the two-way nature of the communication, the right of radio listeners to have access to the social, political, and aesthetic ideas of others, and the right to receive information and ideas in one's own home.[60]

The first case to create a right to know on behalf of recipient plaintiffs was decided by the Supreme Court in 1965--well before the Presidents Council case. The Court held that it was an unconstitutional infringement on the First Amendment rights of addressees to have the "affirmative obligation" to request the receipt of foreign political mail that had been addressed to them.[61] Since it is clear that those who sent the mail (foreign nationals living abroad) had no independent constitutional right to speak, the case protects recipients--those wishing to receive information. As Justice Brennan explains, in a concurring opinion:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect. . . those equally fundamental personal rights necessary to make the express guarantees fully meaningful.

> (citations omitted) I think the right to receive publication is such a fundamental right. . . . It would be a barren marketplace of ideas that had only sellers and no buyers.[62]

The reasoning of the above line of cases was summarized by the Supreme Court in an important case decided in 1976--just after Presidents Council. In Virginia State Board of Pharmacy v. Virginia Citizens Council, the Court again held that the right to know was a protected right. In holding that consumers had a right to receive information through pharmaceutical advertisements, the fact that communication involves reciprocal rights was emphasized. "[W]here a speaker exists. . . the protection afforded is to the communication, to its source and to its recipients both."[63]

The Presidents Council court may perhaps be forgiven for ignoring this line of precedent since the Virginia State Board of Pharmacy case had not yet been decided. But when the District Court in Bicknell (decided after the Virginia case) argued that students have no right to receive information because there is no speaker--authors have no right to speak--it had clearly gone too far.[64] The emphasis in Virginia State Board of Pharmacy was clearly on the right of the consumers of prescription drugs to receive information. Lawrence Tribe in his seminal work on constitutional law says that the right to know is a more generalized right than the right to speak, but that it is not necessary that a correlative right exist in any particular source to communicate.[65] That the court in Bicknell could have misinterpreted the Virginia case so badly can only be explained by its lack of attention to a whole line of precedent beginning more than thirty-five years earlier.

It may be possible for the Second Circuit Court of Appeals to

reconcile these two divergent lines of cases when it reviews Pico and Bicknell. Deselection, it is true, does not always present a constitutional issue--sometimes science books become obsolete, for example. And it is certainly correct, as the court in the Pico case concluded, that the selection/deselection process cannot be content blind. The Minarcini line of cases, however, would not require content blindness. It would require only neutrality in the sense that decisionmaking based on content be made with regard to legitimate educational interests and not become a process devoted to sanitization of the library to suit the social and political tastes of successive school boards.

It is probably only a matter of time until Justice Douglas, who dissented in the Supreme Court's denial of certiorari in the Presidents Council case, is vindicated. There surely is a right to hear, to learn, and to know, which cannot be defeated in the school library.

> The First Amendment is a preferred right and is of great importance in the schools. . . . Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?[66]

Although the rights of teacher/librarians are to be considered in Chapter V, it can at least be suggested at this point that, from an educational point of view, these professionals have an important part to play in the selection/deselection process. Selection and deselection must differ to the extent that less is known about books before they have found their way to the school library shelves; but however the process is accomplished, it must be done in a way that preserves the important and fundamental right of the students to know.

Non-School Speakers and the Student's Right to Know

This group of cases concerns a wide variety of speakers who in one way or another either seek to speak on or near the school campus or are sought out by students and teachers to present their views as part of the regular school program. The leading case dealing with expressive activity occurring off the school campus is the Supreme Court case of Grayned v. Rockford.[67] In that case students, former students, parents of students and concerned citizens were convicted of violating an anti-noise ordinance which prohibited the willful making of noise adjacent to school buildings during the school day. Picketing by the defendants, which lasted for about half an hour, was on behalf of more involvement of balcks in school affairs. The Supreme Court held that the ordinance was neither impermissibly vague nor overbroad but that it was a reasonable "time, place, and manner" regulation that was necessary to further a significant governmental interest. The court relied on the Tinker case in allowing that public sidewalks could not be declared off limits entirely for the purpose of expressive activity. But activity which materially disrupts classwork or invades the rights of others can be prohibited adjacent to schools as well as on school grounds.

An application of the Grayned case can be illustrated by an Arizona case where members of a religious group attempted to broadcast their message by loudspeaker on the sidewalk across from the school at mid-day.[68] They were arrested and held guilty of willful disturbance of a public school. The Tinker case was cited for the proposition that expressive activity may be prohibited if it "materially interferes with or substantially disrupts, the normal operation of schools, school activities, or

the rights of other persons."[69]

Although there are extreme cases which hold that a total exclusion of those outside speakers wishing to speak on school grounds by distributing literature, talking to passersby, etc., is a proper exercise of the state police power,[70] many cases allow such activity within limits. The limits can be illustrated by the following cases.

Where citizens sought to erect a "tent-like structure" on a university library lawn to protest the plight of the Farm Workers, the court held that such activity was not the type of symbolic speech contemplated by the Tinker case and was therefore not entitled to First Amendment protection.[71] A Supreme Court case was quoted by the court to the effect that the right to expressive social protest does not extend to street meetings in Times Square or to red light violations.[72] The court did allow leafletting and talking to passersby, however, saying that such activity was protected by First Amendment speech provisions. A similar case affirmed defendants' trespass convictions for the activity of setting up a card table on school property in order to distribute leaflets, books, and buttons to promote an antiwar demonstration.[73] The First Amendment claim of the defendants was summarily dismissed and the Tinker case was held not applicable to the factual situation.

It appears that here again facile distinctions between speech and action are being made in situations where the "action" is inextricably intertwined with the peaceful, non-disruptive expressive activities of citizens. Perhaps it is possible to speak and to leaflet without tents and tables; but if these activities are first recognized as having speech implications of importance to speakers and hearers as well, then courts

will have to look for a material and substantial interference rather than summarily dismissing the First Amendment claims.

A more speech-protective approach was taken by a California court which overturned criminal vagrancy convictions against adults who peacefully distributed leaflets criticizing the Selective Service System, racism in America, and the Vietnam War on high school campuses.[74] The Tinker case was relied on extensively by the court. It recognized that constitutional rights were generally available in schools and that channels of communication should be kept open in a place which, although dedicated to a special purpose, was a public place. The court was particularly attentive to the rights of students, noting that the right to communicate included the right to hear and to receive information and ideas. It is interesting to note that this case, although perhaps distinguishable from those above as involving pure speech that was not even arguably disruptive, was decided in 1969--well before the others. It is also the only case which makes use of the Tinker dictum that school is a "public place" where people entitled to be there may exercise constitutional rights in a way that would not be permissible on purely private property. In Tinker the Supreme Court was probably referring to students and teachers as those entitled to be there. If the court here is suggesting that adult citizens may have a limited right to be on school grounds, it would seem consistent with the reciprocity necessary to promote the students' right to be informed, to hear, and to know. Intellectual freedom is promoted when students are exposed to a wide variety of views--when they are protected as hearers as well as speakers even though they are at school. There is no reason consistent with the

Tinker case for an absolute ban on citizen speech on school grounds. In fact quite the contrary, for the Tinker court said that schools should not be considered "enclaves of totalitarianism" with students the "closed-circuit recipients" of official state dogma.

The next three cases from Federal District Courts in Nebraska, New Hampshire, and Oregon concern school regulations which are not concerned with the time, place, or manner of speech, but which attempt to regulate the type of expression that can be promoted on school grounds or in classrooms. In the first case the Gazette Publishing Cooperative sought the right to enter on school grounds and distribute copies of their publication, the Lincoln Gazette, on a "free-or-donation" basis.[75] A school rule against commercialism and solicitation was invoked to bar agents of the publishers from distribution at school. The court held that the ban was an invalid prior restraint in violation of the First Amendment in the absence of any indication of a material and substantial interference with school work or discipline. Apart from the fact that the court found that commercialism and solicitation in the Gazette situation were incidental, it believed that in order for a ban to be constitutionally applied on that basis it would have to meet the Tinker test of posing a material and substantial interference. The court was of the opinion that reasonable time, place, and manner restrictions were permissible, but a total ban without a compelling reason was not.

In another publications case, students challenged a school board regulation prohibiting distribution of all non-school sponsored written materials in school and for two hundred feet from the school grounds.[76] The court held that a blanket prohibition of all non-school sponsored

publications was overbroad because it included materials which would not pose a substantial interference with school activities.

The last case involved a blanket prohibition on another type of speech--political speech.[77] Here, students and a teacher sought relief from a school board order banning all political speakers from high school. The ban arose when the political science teacher tried to invite a Communist speaker to class after having received official approval for speakers representing the Democratic Party, the Republican Party, and the John Birch Society. The court held that the speaker ban unconstitutionally infringed on the students' right to hear and on the teacher's freedom of expression by interfering with the choice of teaching method. The court also suggested that outside speakers might have a constitutional right not to be denied equal protection with regard to speaking in school and that the teacher could raise the right of these third parties. So that while they might or might not have an independent speech right to address student audiences, outside speakers at least have the right not to be unfairly discriminated against. This would seem to be consistent with the reciprocal interest of facilitating student learning, hearing, and knowing by providing presentations designed to be balanced in terms of differing points of view.

Because the Supreme Court has ruled with regard to the limits which are appropriately applied to speech off school grounds, those issues seem relatively well resolved. With regard to speech on campus, however, two divergent positions seem to be presented. The first would allow total bans on outside speakers, based on the conclusion that no constitutional issues are involved in such a decision. It represents

an approach that is unduly protective and paternalistic, and is arguably an unconstitutional infringement on the type of intellectual freedom that is necessary in the school environment as well. If the students truly have a right to know, as the second line of cases would suggest, then to deny them that right would require that the speech be of the type that is not constitutionally protected--obscenity, defamation, or fighting words--or that the prohibition comport with the Tinker limitations. As the judge who protected political speakers in the last case wrote:

> I am firmly convinced that a course designed to teach students that a free and democratic society is superior to those in which freedoms are sharply curtailed will fail entirely if it fails to teach one important lesson: that the power of the state is never so great that it can silence a man or woman simply because there are those who disagree.[78]

Curricular Challenges and the Student's Right to Know

In addition to challenges to library materials, to particular textbooks, and to other specific curricular materials, there is a growing group of cases where parents, for the most part, have mounted more general challenges to the curriculum based upon their objections to the values they feel are being transmitted to their children. It seems that these conflicts are more likely to arise to the extent that schools see themselves in the business of transmission or indoctrination of a particular set of values rather than as promoters of a tradition of intellectual freedom. It is unfortunate that the transmission theory as a primary justification of education has been promoted in the legal literature, especially, out of proportion to its appropriate place in the

educational theory of a democratic society.[79] Where intellectual freedom is emphasized, a spectrum of values representative of the diversity of our culture can be considered along with the transmission of basic values to which we are committed as a nation. There is less reason to want to indoctrinate students with a particular point of view if one truly believes that no one else is trying to do the same. While it is rare that the courts in the cases which follow actually consider the student's right to know and to receive information and ideas in any explicit way, the cases nevertheless have implications for the developing right of students in a captive audience to be exposed to a wide spectrum of facts, ideas, and beliefs.

There have been several recent challenges by parents to the attempted implementation by state or local school boards of curricular programs in family life and sex education.[80] These challenges generally take the approach that the teaching of matters related to human sexuality in public schools violates the parents' and/or the students' right to free exercise of religion and their right to privacy. The results have not been uniform, some cases reasoning that the parents have no exclusive constitutional right to teach their children about sexual matters, and others implying that there might be such a right by explicit court approval of excusal systems. There is support, however, for the proposition that if courses are taught within constitutional limits and deemed necessary by state or local boards of education, their controversial nature should not be sufficient grounds for excusal.[81]

At the present time, the fact that the student may have rights that are different from those of the parent is recognized in only a minority

of cases. The students' right to know should arguably be considered along with the parents' right to free exercise and to privacy in the upbringing of their children. Education is not a purely private concern. The fact that state law makes education compulsory is testimony to the importance that the entire community places on education. It is for this reason that the rights and interests of all must be considered.

One case which recognizes that children have a right to receive an education and that this right may conflict with the rights and interests of the children's parents is Davis v. Page, a 1974 case.[82] The father of two children brought an action against the school system to require that his children be excused from all audio-visual programs, from a health course, and from music classes. The requested excusal was based on values and beliefs derived from the family's Apostolic Lutheran faith. While the case poses somewhat of an extreme example, it is nevertheless a good one to illustrate the types of objections that are posed by parents to various curricular materials and methods.

> Plaintiffs have introduced evidence that the dogma of their faith makes it sinful for them to: watch movies, watch television, view audio-visual projections, listen to the radio, engage in play acting, sing or dance to worldly music, study evolution, study "humanist" philosophy, partake in sexually oriented teaching programs, openly discuss personal and family matters, and receive the advice of secular guidance counselors.[83]

In holding for the children, the court balanced the father's right to free exercise of his religious beliefs with the state's interest in providing an education and the children's right to receive that education. The court, citing the Tinker case, recognized that children have constitutionally protected rights that may come into conflict with

those of their parents. Though the rights of parents to control the upbringing of their children must be considered, the court was of the opinion that parents do not have the right to make martyrs of their children in the name of religion or privacy.

This case is exceptional, more for its reasoning than for its result. While there are other cases which reach similar conclusions on similar factual situations,[84] they have not stressed the independent rights that children possess. This is the fact that gives the Davis case special relevance for the issue of intellectual freedom in public schools, especially for the right of the student to know--to receive an education. In recognizing students' rights, it shows itself to be, in spirit, the true progeny of Tinker. The following sections concern the right not to speak and the right to privacy--the right not to know.

The Student's Right Not to Speak

The student's right not to speak was declared as long ago as 1943 in the leading case of West Virginia State Board of Education v. Barnette.[85] In an eloquent opinion by Justice Jackson that has stood as a monument to student rights in general for more than forty years, the freedom to express intellectual and spiritual individualism by declining to engage in the compulsory flag salute was protected by the Supreme Court.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism or other matters of opinion or force citizens to confess by word or act their faith therein.[86]

In subsequent cases students have refused to stand for the pledge

or have declined to leave the classroom when the pledge has been said. Some students have political motives--they believe that there is no liberty and justice for all, or they prefer to sit quietly as a protest against black repression. Some have religious motives. And for some their only motivation is to avoid punishment for their preference not to participate.

The rights of these students have been consistently upheld. One court rejected the notion that sitting down was itself a material and substantial interference or invasion of the rights of others. It said "[A] silent, non-disruptive expression of belief by sitting down" is protected by the First Amendment.[87] Another court held that standing was an "integral portion of [the] pledge ceremony" and could not be compelled consistent with the First Amendment.[88] Citing Tinker, another case held that a student is free to choose his own form of expression as long as there is no material infringement of the rights of others.[89] It is clear that this right not to speak, which is a corollary of the right to speak, will protect students from compulsory affirmations of belief and will allow for a certain amount of intellectual non-conformity. Whether or not these flag salute cases will be invoked to support other instances of the student's right not to speak remains to be seen; but the right not to speak, like the right to speak, is limited by the Tinker disruption standard. Indeed, Justice Jackson presaged that notion himself in the Barnette case when he observed that remaining passive during the pledge was not alleged to have created a clear and present danger that would permit the limitation of expression.

The Student's Right to Privacy

Apart from the protections of mind and personhood derived from the flag salute cases, the right to privacy as it has manifested itself to date in the school situation protects the inward-looking dimensions of privacy--the student's right to be let alone. It has done this in two distinct ways. First, it protects the student from being forced to give information that is unduly personal--it gives sanctuary by protecting the right not to speak. Secondly, it protects the student from being forced as a member of a captive audience to hear and be confronted with information that might be injurious--it gives repose by protecting the right not to know.[90] Although this area of case law is still developing, two cases from the federal courts can be given to show the types of interests that are involved and the ways that courts have begun to resolve them in the public school setting.

In Merriken v. Cressman, a Federal District Court barred the use of an unduly extensive questionnaire designed to identify potential drug users.[91] The questionnaire was administered by school officials and participation in the survey was not voluntary. It sought information about the student questioned and about others of his acquaintance. The court held that students retain their constitutional rights while in school and that one of these rights is the right to privacy implicit in the penumbras of the Bill of Rights. It showed sensitivity to the relationship between the students' captivity and the preservation of privacy in holding that the questionnaire violated the students' right to privacy and interfered with the parents' privileges with regard to

upbringing and discipline.

In protecting the student from being forced to reveal information, the student's right to privacy is being balanced against the generalized police power of the state. Since the right to privacy had been held to be fundamental,[92] it is likely that where doubt exists the right of the student will be upheld.

The opposite aspect of the student's right to privacy--the right not to know, has somewhat more troubling implications. Most obviously, this right is in direct conflict with the very same student's right to receive information and ideas. It is here that the rights of intellectual freedom, broadly considered, and the privacy and personhood rights must be very carefully considered. It is because of the relative immaturity of students and because of their captivity that their right to be left alone must be protected by school officials. But it is because of this same immaturity and captivity that the student's right to intellectual freedom and to the development of mind must be encouraged by a free flow of information and ideas.

A case from the university setting may help to dramatize why it may be necessary to protect public school students from speech, expression, or ideas that, while not physically injurious, would nevertheless seriously interfere with social or emotional growth.[93] The case concerns the display by an artis of several paintings emphasizing genitalia in a public corridor of the university. The court upheld the university's action in removing the exhibit well before it was scheduled for dismantling. The court reasoned that in this case the right to privacy of a captive university audience was entitled to greater

protection than the lesser constitutional interest of the artist in communicating his message.

Charles Alan Wright and Thomas Emerson have argued that expression of the sort sought to be conveyed by the artist in the above case will not necessarily be constitutionally protected even though it falls short of meeting constitutional standards of obscenity in a given context.[94] The thrust of their argument appears to be that the shock effect created by speech that dramatically exceeds the norms of public acceptability is tantamount to an assault on hearers or viewers. Wright and Emerson would argue that this assault carries the force of action, i.e., is not primarily expressive, and therefore not protected. Of course, it is no answer to Wright and Emerson that the purpose of art that is explicitly sexual is precisely to convey a message that may be shocking. Justice Harlan, speaking for the Supreme Court, has more recently said that the Constitution protects the "emotive function" of communication as much as it protects is "cognitive content."[95]

But even allowing that the case of the artist might have been wrongly decided when considered in the university setting, it is by no means so clear that it would have been wrongly decided had the same factual situation arisen in a public high school. The problem is that the assault reasoning employed by Emerson and Wright relies on the same distinction between speech and action that has historically been so difficult to make. If we want schools to be successful in promoting an optimal education for students who are still maleable and vulnerable intellectually and socially, better reasoning will have to be discovered upon which to base the protective measures needed to support the

student's right to repose and to privacy while at the same time protecting other valuable rights. A suggestion for accomplishing this purpose will be made after a case where these issues have arisen in lower education is presented.

In Tractman v. Anker high school students were denied the right to conduct a voluntary, anonymous survey of student attitudes about human sexuality, contraception, and abortion for tabulation and publication in the student newspaper.[96] Although the evidence presented at trial by experts on both sides of the issue was conflicting, the court held that "the record established a substantial basis for defendants' belief that distribution of the questionnaire would result in significant emotional harm to a number of students. . . ."[97] The majority opinion relies on the Tinker case, extending its rationale to cover situations where the potential disruption is psychological in nature rather than physical. But the court waffles in the standard that it applies to the case, at times putting the burden of proof on school officials to demonstrate that there was "reasonable cause to believe the distribution of the questionnaire would have caused significant psychological harm to some . . . students;"[98] and at times requiring only that school authorities "have reason to believe that harmful consequences might result to students."[99]

One concurring opinion concludes that "a blow to the psyche may do more permanent damage than a blow to the chin" and that invasion of the rights of others is not protected by the Tinker case.[100] This judge also believes that the act of solicitation of opinion is somewhat more intrusive than simple dissemination of opinion might be. But while

these considerations are relevant and important ones, it is not difficult to sympathize with the long dissent of Judge Mansfield, who expressed the fear that if the limitation on invasion of the rights of others were extended to prevent "psychological harm," it would pose a dangerous potential for unjustifiable restriction of constitutional rights based on a standard that is inordinately "vague" and "nebulous."[101] It is arguable that this case presents just such an example of unwarranted and paternalistic intrusion on the constitutional rights of students. Judge Mansfield felt that the record lacked a "substantial basis" in evidentiary fact to prove that "significant psychological harm" would result to an "appreciable number of students." He also felt that the defendants' understanding of high school students living in a media-oriented, urban environment was so "unreal and out of touch with contemporary facts of life as to lead one to wonder whether there has been a communications breakdown between them and the next generation."[102]

But while the danger of abuse must be fully appreciated, standards do need to be developed by which to balance rights in extraordinary cases. What needs to be remembered in such cases is that standards and tests are merely tools which must always be applied with due consideration given to both constitutional principle and contextual circumstances. What could be more vague than the test of material and substantial interference considered out of context? But given the fact that schools must not only provide an environment suitably free from physical disturbance but that the developmental level of the students themselves must also be considered, there may be no better standard than a material and substantial interference test extended to protect the emotional, social,

and intellectual growth of the students. The problem with the majority opinion in the Tractman case is that the judge is not quite sure whether interests of sufficient import are involved to warrant close scrutiny of official action.

The interests involved on both sides of the case in Tractman appear to be fundamental ones--the right of students to gather and to print information and the right of other students either to receive the questionnaire or to be let alone. With fundamental rights so heavily implicated, minimal scrutiny of administrator judgment and action simply will not do.

Conclusion

The right of the student to speak and to receive information and ideas while in school is a fundamental right deserving of encouragement and protection. While speech-protective student rights cases like the Tinker case have brought a generally heightened awareness of these rights, occasionally brilliantly defended by a lower court judge, there is still an all too evident tendency to overcontrol the school environment and to overprotect the individual student. In general, administrative judgments based on the unique characteristics of the school situation are given far too much deference by courts eager to avoid involvement in school concerns.

Student rights while in school are often denigrated by a distinction between speech and action which denies the existence of First Amendment issues. When the speech issue is recognized and considered by the court, the factual situation should be publically explicated in the opinion so that all will know that decisions have been based on specific facts

rather than on generalized inference. Where the prohibition of speech is based upon the Tinker disruption limitation, an explicit finding of a material and substantial interference should be made by the court. The use of the Tinker test as applied in various factual contexts should be made a part of the written opinion both for justificatory reasons and as an aid to future action and decision-making.

Of the many unresolved problems and issues that arise in the present chapter, a few are particularly important: whether total bans on speech are per se legitimate in the school context; whether constitutional rights of students are implicated when school officials select and eliminate materials from the school library; and how the student rights to equal protection and to privacy are to be balanced with the fundamental right to speak and to know.

Some of these issues will reappear in the next chapter, which deals with the student's right to compose and distribute literature, leaflets, newspapers, and other written materials in public schools. The legal and educational issues surrounding prior restraint will assume special importance, but the general issue of how best to promote and protect intellectual freedom in schools will continue to be emphasized.

CHAPTER IV

THE REGULATION OF WRITTEN MATERIALS: THE STUDENT PRESS, LEAFLETS, AND PETITIONS

> The "Awakening" contains absolutely no material that could remotely be considered libelous, obscene, or inflammatory. . . . As so-called "underground" newspapers go, this is probably one of the most vanilla-flavored ever to reach a federal court.
>
> Circuit Judge Goldberg
> Shanley v. Northeast Independent School District (Fifth Circuit, 1972)

Introduction

The First Amendment right to freedom of speech and press includes the right to produce and to distribute a wide variety of written materials. It is axiomatic that if students retain their constitutional rights while in school, they also retain their right to engage in the production and distribution of newspapers, literary magazines, flyers, petitions, and leaflets. The extent to which this right may be regulated or limited to conform to the special requirements of a learning environment devoted to elementary and secondary education is the subject of this chapter. It begins with a general review of the historical ban on prior restraint of the press, relates that issue to the student press, and then continues with a development of the scope and limitations on the distribution of a number of other written materials in public schools.

Prior Restraint of the Student Press

The issue of prior restraint is one of the most complex and

ambiguous areas of First Amendment law. Constitutional law scholar, Thomas I. Emerson, called the concept "curiously confused and unformed," despite an "ancient and celebrated history."[1] Because of the existential nature of ideas when reduced to written form as opposed to the nonmateriality of thoughts, the possibility of censorship or of review by others prior to any general dissemination of ideas arises. The classic prohibition against prior restraint is understood as an absolute bar to the general regulation or review prior to dissemination of written materials, films, etc., even though they may contain speech, such as obscene speech, which is currently not protected. The term prior restraint is also used by courts to refer to blanket prohibitions, such as those banning the distribution of all political materials in school, for example. In this chapter, the term prior review will often be used to refer to general systems of prior restraint. The prior restraint terminology will be used for blanket prohibitions and as a general term covering both prior review and blanket prohibitions.

The issues involved in prior restraint were first considered by the Supreme Court in the leading case of Near v. Minnesota, decided in 1931.[2] The Minnesota legislature had provided for the issuance of permanent injunctions against the publication of written materials that were "malicious, scandalous and defamatory." In declaring the statute to be an infringement of the liberty of the press, the Court discussed the history of the First Amendment guarantee.[3] It concluded that the major purpose of the constitutional free press provision had been to promote freedom by prohibiting any prior censorship such as that which had been allowed by the English systems of licensing. The appropriate remedy for

the abuse of this freedom to publish, according to the Court, was subsequent punishment. At the same time, however, the Court in Near departed somewhat from this historical view. While the decision did not expressly allow for general systems of prior review, it did conclude that government could prohibit speech in exceptional cases. These cases would arise, according to the Court, where the recruiting service was actually obstructed, where speech was obscene, where it would have the effect of force, or where it was an incitement to violence.[4]

The 1961 Supreme Court case of Times Film Corporation v. City of Chicago represents another assault on the historical ban against prior restraint.[5] In this case a Chicago ordinance requiring the prior review of films was challenged. In a five to four opinion recognizing Chicago's "duty to protect its people" from obscenity, the majority rejected the claim of absolute privilege against prior review that had been asserted by the Times Film Corporation. The dissenting opinion of four justices, written by Chief Justice Earl Warren, lamented the rejection of what it called "an inherent and basic principle of freedom of speech and the press."[6]

> Now the Court strays from that principle; it strikes down that tenet without requiring any demonstration that this is an "exceptional case," whatever that might be, and without any indication that Chicago has sustained the "heavy burden" which was supposed to have been placed upon it. Clearly, this is neither an exceptional case nor has Chicago sustained any burden.[7]

Thomas I. Emerson, in his book The System of Freedom of Expression, says that although the dissenters in the Times case finally explicated the importance of the traditional ban on prior restraint, it was too late. "At least as far as movie censorship was concerned, the doctrine

in its original form was abandoned."[8] Emerson's general review of prior restraint cases arising in various social contexts leads him to conclude that much of the protective force of the original notion of prior restraint has been dissipated and now "merely signifies a type of restriction that the courts will scrutinize with special care."[9]

From a general overview of the cases which have arisen in school contexts, it appears that here also the doctrine which historically prohibited systems of prior review has been almost completely abandoned. While it is not so difficult, by comparison with many of the speech cases presented in the previous chapter, to accept the notion that some speech is unprotected and thus can be stopped in a particular instance, it is not so easy to accept the idea that all written materials can be properly subjected to systematic review before dissemination. The question becomes, isn't this precisely the type of prior restraint that the framers of the First Amendment intended to prohibit? We might well ask, along with Chief Justice Warren, what makes prior review in the school press cases exceptionally necessary. Not surprisingly, these complex issues and questions have led to some difference of opinion by courts which have considered the issue of prior restraint with regard to the student press.

Before beginning a general review of the cases dealing with prior restraint in the school, it might be advisable to emphasize that even if schools do not have a general system of prior review, the dissemination of certain speech can be prevented. This would include obscenity, defamation, fighting words and speech which would case a material and substantial interference with school discipline.[10] It should be kept in

mind, however, that the advocacy of illegal or uncooperative action in written materials will not, without more, be held substantially disruptive and therefore subject to prohibition.[11] But whatever the nuances that separate protected from nonprotected speech, it is sufficient to note here that administrators are not legally prevented from stopping the dissemination of prohibitable speech, once it is discovered, or from punishing the disseminators pursuant to a valid school rule,[12] simply because they have not established a general system of prior review.

Although it has often been repeated that any system of prior restraint bears "a heavy presumption against its constitutional validity,"[13] there is only one important case which abides by the classic prohibition against prior restraint with regard to the student press--Fujishima v. Board of Education.[14] The view presented by this case is definitely a minority view. Although it has never been directly overruled, there is evidence that the reasonging and philosophy of the case have been substantially rejected even in cases arising in the same jurisdiction.[15]

In Fujishima, three male high school students were suspended for the in-school distribution of an underground newspaper, The Cosmic Frog, a petition, and leaflets about the war in Vietnam, because they did not first secure the approval of the superintendent as was required by a Chicago rule. Citing the Stpreme Court decisions in Near and Tinker, the Seventh Circuit held that the rule was unconstitutional on its face as imposing a prior restraint on the First Amendment rights of students to freedom of the press. Although the court said it would allow appropriate rules regulating the time, place, and manner of speech to prevent, for example, distribution during a fire drill; it would not allow a

general system of prior review. The court felt that those cases from other circuits which had interpreted the Tinker case as allowing for systems of advance review were plainly wrong.

> Tinker in no way suggests that students may be required to announce their intentions of engaging in certain conduct before hand so school authorities may decide whether to prohibit the conduct. Such a concept of prior restraint is even more offensive when applied to the long-protected area of publication.[16]

The court expressed its belief that the appropriate way to interprete the Tinker forecast rule was as "a formula for determining when the requirements of school discipline justify punishment. . . ."[17] That is, if a reasonable forecast of prohibited behavior amounting to a substantial disruption could have been made, then the students are properly held responsible.[18]

Although there is very little support in the case law for the exceptionally speech-protective approach taken by the court in Fujishima, Leon Letwin has persuasively argued against the double standard which exists with regard to the student press and the press of general circulation.[19] After examining several cases from the Fourth Circuit,[20] where prior review is permitted, he argues that even if prior review were necessary it would not be feasible to provide constitutionally valid substantive standards and procedures. Substantive standards must be defined narrowly and with exacting precision, and the notion of a prompt procedural review process inherently conflicts with the student's due process right to have time to defend a prohibited dissemination. Taken together, the criteria and procedures lead to undue self-censorship, well-meaning but impermissible censorship by school officials, self-interested censorship of criticism by school authorities, and to the

type of delay that is tantamount to a denial of speech. Letwin concludes that "the prudent course is to reject ex parte restraints by school authorities and to reject the "double standard in respect to the press rights of students" as not feasible and unnecessary in the school context.[21]

> The appropriate accommodation of first amendment rights and school disciplinary needs is to reject that constitutionally abhorrent form of governmental power, affirm the vitality of the first amendment in the educational system, and rely on traditionally favored remedies to deal with any serious abuses that may arise.[22]

The minority view, presented by the Fujishima case and by Letwin, can easily be contrasted with the majority view, which would not deny, at least in theory, that a valid system of prior review can be developed and implemented in cases involving the distribution of written materials in school. Although courts seldom attempt to justify general systems of review as necessitated by exceptional circumstances as Near had required, a few cases may be pointed to from which such a justification could conceivably be created.

One Federal District Court case, Frasca v. Andrews, can be used to to illustrate why general systems of prior review might arguably be considered necessary and justified as exceptional cases in the context of public schools.[23] Here, the former Ebitor-in-Chief and the present Assistant Editor of an official high school newspaper sought an injunction against the principal's seizure of the final issue of the school paper. The principal seized the paper, in part, because of a letter to the editor which criticized the conduct of a particular student. In addition to accusing him of having been a "total failure" in his duties

as Vice President of the student government (an opinion which is arguably protected), it said that he had used a computer to falsify his report card grades, and that he did not maintain a high academic average. The court held that because the principal's investigation showed that the letter was "substantially false," he had a "rational and substantial basis" for preventing its publication based on the fact that libel is not protected speech. Even if the libeled student could collect money damages from the person who spoke falsely, it might be asked if that remedy would be sufficient from an educational point of view where emotionally less mature and captive students are involved.

In the same case, the court held that another letter to the editor and a response to it were unprotected because there was reason to believe that its publication "would create a substantial risk of disruption. . . ."[24] The court does not consider whether or not the degree of disruption would have been substantial. The letters, which admittedly contain offensive langauge, follow:

> Sports editor,
>
> We, the Lacrosse players. . . would like to know why you do not have any sports articles in the Chieftain. We would like a formal apology in public or else we will kick your greasy ass.
>
> /signed/ Pissed Off
> S.H.S. Lacrosse Team
>
> . . . . . .
>
> We would like to reply by saying that the articles were stolen. We would also like to say that you hotheaded, egotistical, "pissed Off" jocks. . . do not deserve an apology for anything. . . .
>
> /signed/ The Editors[25]

The evidence showed "concern" over the "possibility" of disruption and "inharmonious" relationships; and while there well might have been evidence that the letters would have created a material interference with school work or discipline, it does not appear in the written opinion. The point here, however, is primarily to illustrate the types of written materials, which when considered in context, might be used in an attempt to justify prior restraint in public schools as an exceptional case.

A Federal District Court in Texas made an attempt to justify the implementation of a general system of prior review in the school context based upon the fact that students are a captive and relatively immature audience, and upon the fact that the educational process required that a certain kind of environmental situation be maintained.[26] It is certainly arguable that school authorities have the right and the duty to protect students from material and substantial disruptions as well as from the harms that might flow from allowing the free distribution of unprotected forms of speech. But even when courts do not attempt this sort of explicit justification, they almost universally allow for the possibility of the constitutional implementation of general systems of prior review of written materials in schools.[27] A major limitation, however, is that the distribution must be a substantial one.[28] The criteria and procedures that have been developed for prior review in schools will be considered in the cases which follow.

In the leading case of Eisner v. Stamford Board of Education, the Court of Appeals explicitly rejected the lower court's conclusion that prior review would be unconstitutional in all circumstances.[29]

> A public school is undoubtedly a "marketplace of ideas." Early involvement in social comment and debate is a good method for future generations of adults to learn intelligent involvement. But we cannot deny that Connecticut has authority to minimize or eliminate influences that would dilute or disrupt the effectiveness of the educational process as the state conceives it.[30]

The Eisner court, unlike the court in the Fujishima case, interprets Tinker as allowing for considerable administrator discretion to both control the educational process and to "restrain the distribution of disruptive matter."[31] The court in Eisner looked at several cases to develop a relatively comprehensive list of the substantive criteria by which school officials could legitimately bar literature from the school. Obscenity, libel, and insulting or fighting words are not protected.[32] Words which have the effect of force, in addition to fighting words, are not protected.[33] And words which would create a material and substantial interference with school activities would not be protected.[34] But while school officials may censor the content of written materials, another court gives this warning: "[T]he school board's burden of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory."[35]

While the Eisner case shows that it is theoretically possible to establish criteria for prior review that will withstand constitutional challenges of vagueness or overbreadth, in practice this has been very difficult for schools to accomplish. In one case where a prior submission rule prohibited materials that were "libelous" and "obscene," the rule was held invalid because it was vague.[36] Vagueness was said to be "intolerable" in a prior restraint context. The regulation needed,

according to the court, "narrow, objective, and reasonable standards by which the material will be judged."[37] Another case held that a rule was vague which provided that student publications must meet the "journalistic standards of accuracy, taste, and decency" of newspapers in the general community and not be obscene, libelous, or incite to crime.[38] In another case a regulation prohibiting material that would incite disruption was held to be both overbroad and vague.[39] It was overbroad because it did not limit itself to proscribing what would incite a "material disruption, and it was vague because disruption was not precisely defined. Another policy was held overbroad for including protected commercial speech within its prohibition.[40] And in a final case, the prior submission rule was invalidated because it did not detail the criteria "by which an administrator might reasonably predict" the occurrence of a substantial disruption or a material interference with school activities.[41] The court in this case held that the discretion which could properly be exercised by school officials was limited by the First Amendment rights of the students. Many more examples of vagueness and overbreadth could be given, but these few will serve to illustrate both how the courts have protected student press activities and the difficulty of narrowly defining general terms and terms with precise legal significance.

In addition to defining suppressable materials with particularity, courts which permit prior review have demanded that various procedural safeguards be instituted in order to limit the adverse effects of prior restraint. The idea of procedural limitations on the power of censorial review was developed in the Supreme Court case of Freedman v. Maryland--which concerned a film censorship system.[42] The court required that the

burden be placed on the censor, that a judicial determination be had before final restraint, and that the period of time for review be brief. The importance of judicial review of relevant facts where free speech issues are involved was emphasized by the Court. Freedman v. Maryland was followed to a great extent by the court in Eisner, the first case to discuss the necessary procedures for prior submission by students of written materials in schools. Although the Eisner court did not require school authorities to seek judicial review, it did reaffirm that the burden was on school officials to justify censorship and that the procedure should specify "to whom and how material may be submitted for clearance" and should contain a "definite brief period within which review of submitted material will be completed."[43]

Later cases from the same circuit which decided the Eisner case expanded the necessary procedural requirements, adding that the procedures must specify the effect of failure to give prompt review;[44] that an adequate and prompt appeal procedure must be provided;[45] and that students must be guaranteed the right to defend their position.[46] Other cases have confirmed that contingency plans may be necessary;[47] and that an appeal procedure should be provided.[48]

The most colorful speech-protective language to be found in the student press cases comes from the Fifth Circuit case of Shanley v. Northeast Independent School District.[49] In upholding the right of five seniors to print and distribute an underground newspaper adjacent to the high school, the court referred to the case as a "judicial believe-it-or not" where the school board "failed to recognize even the bare existence of the First Amendment" when it drafted a policy regarding the production

and distribution of printed materials.[50] The two controversial subjects contained in the suppressed underground newspaper, The Awakening, advocated a review of the marijuana laws, and told where information about birth control could be obtained. The court characterized the content of the paper as so benign that "it could easily surface, flower-like, from its 'underground' abode."[51] In addition to being declared vague and overbroad, the prior review policy in Shanley was held constitutionally deficient because of its inadequate review procedures. In addition to the initial review, the court required that the policy state "a reasonable appellate mechanism and its methodology" and give "a brief and reasonable time during which the appeal must be decided."[52] The educational purpose underlying strict procedural protections for First Amendment speech activity was eloquently stated by the court.

> [T]he purpose of education is to spread, not to stifle, ideas and views. Ideas in their pure and pristine form, touching only the minds and hearts of school children, must be freed from despotic dispensation. . . . It is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass.53

There are obvious reasons why almost all systems of prior review that have been considered by the courts have been held to be constitutitionally vague, overbroad, or lacking in appropriate procedures that will minimize the adverse effects of prior restraint. At the present time, however, schools wishing to establish systems of prior review of student press activities, must make a good faith effort to precisely define the criteria to be applied and to institute procedures for review and for appeal.[54] The exception to the general rule would be for

schools in the states comprising the Seventh Circuit--Wisconsin, Illinois, and Indiana--where prior review has not been permitted. If school officials should decide that the legal requirements are too onerous or that a general policy of prior review of written materials is not necessary, they might begin to consider what alternative means could serve the legitimate goals of review without providing the opportunity for illegal censorship of opinion. The Seventh Circuit stands alone in recommending subsequent punishment as a viable alternative to prior review. Letwin suggests, in addition to the punishment of students engaged in proscribed and licentious speech activities, that the school call upon its police powers to silence those creating any disruption or disturbance, or that it seek an injunction to prevent illegal speech in an exceptional case.[55] In addition, educational alternatives providing for a voluntary or mandatory advisory system might obviate the necessity for any of these more extreme procedures.

The general history of First Amendment law teaches that prior restraint should not be taken lightly. Whether the review of the student press can be justified as a general policy or whether it represents an unconstitutional and paternalistic double standard is yet to be completely resolved by authoritative court decision. And despite the important educational interests at stake, or possibly because of these interests, the restrictions allowed by the explicit or implicit approval of prior restraint may yet be eliminated by constitutional design or by default.

Written Speech: Protected and Not Protected

A problem tangentially related to student freedom to distribute written materials in and near school involves situations where, in addition to potentially protected speech activities, the students engage in a "pattern of open and flagrant defiance of school discipline,"[56] or are accused of "gross disobedience."[57] The three cases that will be used to illustrate this problem involve three underground newspapers, The High School Free Press, Space City, and The Plain Brown Watermelon.[58]

In all three of the above cases the students who sought to distribute the newspapers in school were told not to do so, either because the prior review policy had been ignored;[59] or, in one case, because the previous issue had "four letter words, filthy references, abusive and disgusting language, and nihilistic propaganda."[60] Taken together, the cases contain examples of the following behavior that was held to be independently unprotected in the school context: defiance of school prior submission policies, refusal to surrender newspapers upon request, trying to get others to refuse to surrender papers, using profanity in confrontations with school officials, and defying suspension policies. Even though the speech-related activities of these students probably would have been otherwise protected, the cases uniformly held that the students involved could be reprimanded or disciplined for gross disobedience, or for a pattern of defiant behavior.

> Students should not be permitted to ignore. . . legally enacted regulations of the school board. Even if such regulations impinge in the most flagrant manner upon the constitutional rights of a student, his remedy is to challenge the rules through

lawful means.[61]

Furthermore, since the students were being disciplined for their behavior and not for their speech activities, there was no need to find that there had been a material and substantial interference with school discipline as would otherwise be required by Tinker.[62]

The overwhelming message in these cases is that even though student constitutional rights are being infringed by unconstitutional prior review policies or by unconstitutional ad hoc suppression, the students have very little choice but to respectfully seek to challenge the actions or procedures through established educational or legal channels. The legal system requires all who seek their aid to come into court with "clean hands."[63]

The one exception to the clean hands policy would be if students sought to challenge a prior review policy as unconstitutional on its face and were successful. Even though the behavior of the particular students could have been punished under a properly drawn policy, the courts will enjoin their punishment because of the law's potentially unconstitutional application to others.[64] This type of adjudication in the First Amendment free speech area is an exception to the rule that plaintiffs cannot ordinarily litigate the rights of third parties.[65] It is necessary because regulations which are vague and overbroad, and therefore invalid on their face, will often serve to chill speech through self-censorship. As a practical matter, therefore, those who have violated the policy are often in the best position to challenge it.

The following group of cases represents ways in which courts have protected speech where school officials have sought to regulate written

materials by blanket suppression, by interference even though there was no material and substantial disruption, by regulation of the content of protected speech, or by reaching beyond the authority of their police powers into the community.

The instance of blanket suppression is illustrated by a regulation which prohibited "circulating propaganda" which is "alien to school purposes," including all political, religious, or commercial literature; and the recruiting of members for political and religious groups.[66] Not surprisingly, the court held the attempted regulation both vague and overbroad. The court did not allow the attempted prohibition of distributional and recruiting activities because they were not limited to those activities that would materially disrupt school discipline or that would interfere with the rights of others. In a similar case, the court held the rule against the distribution of all non-school sponsored written materials in school and for two hundred feet beyond school property to be overbroad because it was not limited to that type of distribution that would pose a material and substantial interference.[67] Another case which illustrates that courts do not look favorably on the blanket suppression of non-school related ideas appearing in written materials concerns students who wished to publish an advertisement opposing the war in Vietnam in the school paper.[68] Relying on the rationale of the Tinker case, the court held that students could not be limited to expressing only "matters pertaining to the high school and its activities" in the school paper.[69] The court was of the opinion that the First Amendment gave a right of access to students premised on the fact that the paper was a "forum" for the expression of diverse

student opinion.

Even where there is no attempt at blanket suppression, courts have sometimes looked carefully in making their independent determination to see if there was a reasonable forecast of a material and substantial interference. In one case two student editors were suspended from school and removed from extra-curricular activities for their part in the production of a literary journal that was critical of school policies and school authorities.[70] The punishment was accomplished pursuant to a state statute which proscribed "gross disobedience or misconduct." The misconduct consisted of the distribution of written materials containing the opinion that the dean had a "sick mind," as well as the statement that "oral sex may prevent tooth decay." The journal further urged students and faculty to refuse to accept or to destroy "propaganda" given them by school officials.

Reversing a former opinion on rehearing, the Court of Appeals invalidated the student suspensions because the criticism was not a material and substantial interference per se and there had been no evidentiary hearing on the issue of a reasonable forecast of a material and substantial interference. There had been a storm of protest in legal circles over the original opinion, which had ruled for the school board even though no evidence was taken on whether the Tinker forecast rule had been reasonably applied by school officials.[71] The decision contains no evidence that the student punishment was based on anything but the objectionable content.

In a similar case, one student editor and one student who wished to receive a banned copy of the Farmingdale High School newspaper, which

included a sex information supplement, brought their challenge to federal court.[72] The court held that the confiscation by the principal was not reasonably necessary to avoid a material and substantial interference with school work and discipline and therefore violated the First and Fourteenth Amendment rights of the students. More generally, this case illustrates the proposition that school officials cannot ban the distribution of literature because of a desire to suppress the content.

Another case which dealt with birth control information concerned an article, "Sexually Active Students Fail to Use Contraception," which appeared in a student paper called The Farm News.[73] Although the school board argued that the paper was created as part of the curriculum and that students were a captive audience that needed protection, the court rejected these arguments. In the opinion of the court, the paper had been established as a "public forum" and not as an "official publication" that was a part of the curriculum.[74] For this reason the general power of the board to regulate the curriculum would not apply to allow them to ban the portions of the school paper which were found objectionable. The lower court had observed that in this case the students were actually less captive than they had been in Tinker, because to receive the communication required the affirmative act of reading the newspaper.[75]

The banning of purportedly obscene materials is another area of frequent litigation. In one case a student literary magazine, Streams of Consciousness, was impounded by the principal because it contained four-letter words, a description of a movie scene where the couple "fell into bed," and was generally "obscene."[76] A Federal District Court

directed the return of the magazine noting that it was not obscene based on the standard which is applicable to minors. There was "no extended narrative tending to incite sexual desires or appealing to the "prurient interest" of minors.[77] Based on the obscenity standard in Miller v. California (with the addition of the variable obscenity idea from Ginsberg v. New York which defines obscenity relative to age) a work would be obscene for minors if, taken as a whole, it "appeals to the prurient interest" of minors, describes sexual conduct in a "patently offensive way," and "lacks serious literary, artistic, political, or scientific value."[78]

Another area in which problems often arise, as was pointed out in the previous chapter, involves cases where the First Amendment protections for speech and religion might conceivably come into conflict. In a case where parents challenged the school's guidelines for the distribution of religious literature, arguing that to allow distribution would create an establishment of religion, the court held in a nine to five opinion that the distribution of religious literature should be treated like the distribution of other literature and not banned based upon considerations of content.[79] A judge whose opinion was eventually adopted by the majority argued that to disallow religious literature in school would be a "wooden, nonconstitutional formulation of a wall of separation."[80] It would be to "single out religion for especial and hostile treatment and to stand the First Amendment on its head."[81] "[L]et all be heard, the Jew, the Catholic, the Protestant, the Buddhist, the Atheist--all who care enough to come forward to advance or defend their views."[82]

The general lesson of this latter group of cases is that the courts will look for narrow and specific policies that impose any type of prior restraint and for actual evidence of a material and substantial interference before accepting administrator action in derrogation of the free speech rights of students. They will also look to see if the content of written materials is being impermissibly scrutinized. Apart from conten which is obscene, libelous, inflammatory, or which in some other way creates a material and substantial interference or interferes with the rights of others, it is probable that no other prohibitions can be constitutionally imposed.[83]

The next two cases to be considered in this section show that courts will generally allow schools to regulate the distribution of written materials, within limits, even though that distribution takes place off the school campus.[84] It stands to reason that to provide talismanic immunity to distribution beyond the geographical boundary of school property would not serve to aid the implementation of several important educational policies. What is relevant is whether the materials distributed will affect the school, not where they are distributed. Two Federal Courts of Appeals cases have set limits on the school's authority with regard to the distribution of written materials off school grounds. The earlier case upheld the right of five seniors to print and distribute an underground newspaper on property adjacent to the high school.[85] In reaching its decision, consideration was given to the fact that there had been no material and substantial disruption either actual or foreseeable. Recognizing that the justification for regulation pertains to the effect on schooling itself, the court gave

the opinion that the authority to punish off-campus activity could not exceed the authority to punish on-campus behavior. The later case concerned the five day suspension of a high school student who distributed an allegedly obscene magazine off school grounds.[86] The court felt that the publication, Hard Times, was "aptly described by the banner across its cover as 'uncensored, vulgar, immoral.'"[87] Noting that there was no evidence of any activity or any effect within the school, the court held that "the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon."[88] Absent an in-school effect, the students have the First Amendment right to produce and distribute the magazine off school grounds, subject to the right of parental discipline.

Of course, school boundaries are not irrelevant. The closer the distribution is to the school grounds the more likely its effect will be felt in the school building itself. But the authority to regulate out-of-school activities will have to be found in the general police power of state officials and exercised in a manner that will allow the broadest protection of intellectual freedom.

The last group of cases in this section involves situations where the written speech activities of students have not been protected. The inquiry focuses on the propriety of the various rationales for the suppression of intellectual freedom in cases where the type of speech objected to has been either religious speech or speech which was considered to be either indecent or vulgar.

Unlike the Fifth Circuit case considered earlier where the

distribution of religious literature in schools was treated like the distribution of all other literature, a Federal District Court in Nebraska held that the distribution of religious literature in school was not religiously neutral and therefore violated the First Amendment prohibition against religious establishment.[89] The court felt that to permit the distribution of religious literature in school would be more than an accommodation of religion. It would be interpreted by students and parents alike as having been approved by the board of education. While there may very well be good reasons for disallowing the distribution of religious literature in school, the court does not fully develop them. It does not consider the existence of a possibly conflicting First Amendment speech issue, and it does not adequately distinguish religious from political literature.

In a New York case where students at a public college attacked religion in a student publication, the court held that such activity was a violation of the government neutrality toward religion required by the First and Fourteenth Amendments.[90] "The students. . . are perfectly free to hold views against religions, to voice these views and to publish them. They may not, however, utilize public facilities to do so."[91] The Tinker case was cited for the proposition that speech may be regulated when there is a constitutionally valid reason to do so and when there is an interference with the rights of others. Again, the rationale is not really clear. Why is it that religious speech is distinguishable from other speech? What is the specific constitutional rationale for such separation?

The general issue presented by these cases seems to be whether

state school officials promote or establish religion by simply allowing or granting the privilege to distribute, discuss, or publish religious views? Is financial aid, either direct or indirect, which is given on a content neutral basis, sufficient to implicate the state in the views espoused? Is a complete separation between school activities and the activities of religious groups necessary to prevent an entanglement between church and state? At least with regard to student newspapers, there is growing support for the idea that they are not to be viewed as agencies of the state, but as semi-public forums where students have considerable freedom in presenting their views on a wide variety of topics, perhaps including religious ones.[92] It is at least arguable that the two cases which did not allow the distribution and publication of religious materials illustrate the proposition that when freedom of speech potentially conflicts with freedom of religion, the free speech provision of the First Amendment is undervalued. If this is not the case, fuller explication should be given in written court opinions so that the public may see how these important values, both of which are encompassed by the notion of intellectual freedom have been reconciled.

With regard to the issue of whether or not school officials may constitutionally prohibit speech which is indecent and vulgar, though not obscene, there is one case which holds that "First Amendment rights to free speech do not require suspension of decency in the expression of . . . views and ideas."[93] The court found Tinker irrelevant because in that case vulgarity had not been involved. The case concerned the suspension of the senior class president and the president of the student body, for distributing an underground newspaper, Oink, which contained four-letter

words, a drawing of then-President Nixon making an obscene gesture, two drawings of nude women, and two erotic poems. In concluding that there was no need to show disruption (obscenity was not mentioned), the court showed considerable solicitude for what it considered to be the proper moral standards for a learning environment. A concurring opinion in a recent case supports the conclusion that school authorities can properly regulate indecent language and that such regulation does not necessitate a finding of disruption or obscenity.[94]

> School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children. . . . With its captive audience of children, many of whom, along with their parents, legitimately expect reasonable regulation, a school need not capitulate to a student's preference for vulgar expression.[95]

While it may be true that indecent speech which is not obscene will not be constitutionally protected in the public school environment, there has not been an authoritative opinion in the school law area which either defines indecent speech or gives a supporting rationale for its suppression based on anything more than vague notions of decency, civility, and morality. To assume that FCC v. Pacifica Foundation, which involved the banning of indecent speech from prime time radio programs, is directly applicable is to forget that broadcasting has always received the most limited First Amendment protection.[96] The Supreme Court, in a divided opinion, considered that words referring to excretory or sexual activities or organs from comedian George Carlin's satiric monologue "Filthy Words," when broadcast in the afternoon, were a nuisance, not unlike a pig in a parlous. Justice Brennan, in dissent, says that the Court's result is "patently wrong," "dangerous," and "lamentalbe." He also

finds it disturbing that some members of the Supreme Court have

> a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.[97]

It is apparent that if objectionable speech which is not legally obscene for minors is to be held unprotected, a good constitutional rationale needs to be developed. Until then, it can be argued that such speech should be protected in order to avoid an undue chilling effect on freedom of communication.

Despite the obscenity rules developed by the Supreme Court in Miller v. California, which makes a finding of obscenity somewhat easier to achieve than it had been previously,[98] it is probably true that the so-called variable obscenity standard still retains considerable vitality.[99] This standard, which was first enunciated by the Supreme Court in Ginsberg v. New York, would allow the determination of obscenity to be made relative to the age and level of maturity of the audience.[100] That is, what is obscene for minors would be decided by considering the average minor, not the average adult. The purpose of this variable standard is to support the rights of the parent with regard to child-rearing and to protect the state's interest in child welfare. But to admit the continued vitality of the variable obscenity standard is not to permit the implementation of policies which would prohibit offensive materials that meet some lesser standard. There is considerable support for the proposition that the only constitutionally valid reasons for limiting student speech are the traditional ones suggested

by the Supreme Court cases of Tinker and Chaplinsky.[101] Speech that is obscene, libelous, or consists of fighting words, or which would create a material and substantial interference would be prohibitable.[102] An explicit finding of obscenity is just as necessary in school situations as it is in the public forum.[103] Of course this does not mean that speech which offends but which is not constitutionally obscene might not be prohibitable on some other grounds. The issue of the student's right not to know and not to hear, made especially important because the student is part of a captive audience, also needs to be considered. But whatever the reason for repressing or censoring speech, the major point remains that it must be one that meets constitutional standards so that intellectual freedom in schools can be protected and promoted consistent with other rights.

Commercialism and Solicitation

Attempts by schools to ban commercial and promotional activities are generally motivated by a desire to maintain the kind of school environment which is conducive to educational endeavors and to protect students, who are less mature and captive, from being subjected to the pressures which would inevitably accompany monetary solicitations. The desire has not been to interfere with the distribution of written materials per se, but to preserve institutional order and to protect immature and naive students from undue pressure. Because these rules do not aim at suppression of the content of speech but at the non-communicative impact of speech, the question becomes whether or not the regulation unduly constricts the flow of communicative activity.[104] In

order to answer this question in cases which arise in public schools, it is necessary to briefly review an important concept that has developed in First Amendment adjudication over the last forty years or so--the concept of the public forum.[105]

The idea behind the concept of a public forum is that there are certain places, such as streets and parks, which have historically been used by people wishing to communicate. This use has been so continuous and pervasive that these places have taken on a special meaning and a special status, and speech-related activities in such places cannot be regulated unless such regulation is necessary to serve a "significant governmental interest."[106] The type of restrictions which are generally considered appropriate are limited to those controlling the time, place, and manner of speech. Several commentators have suggested that schools, which have a special interest in promoting intellectual freedom, are public or semi-public forums, where speech-related activities can be regulated only to the extent necessary to maintain the activities associated with their central purpose.[107]

The first two cases to be considered in this section represent the minority and less speech-protective view regarding commercialism and solicitation in public schools. The first case presents a challenge to a forty-seven year old school rule against "soliciting funds."[108] The four plaintiffs in the case had distributed a leaflet called "Join the Conspiracy" in an attempt to solicit defense money for eight Illinois defendants. Apparently asking merely whether the rule against solicitation was rational, the court held that there was a "sufficiently high probability of harm" from multiple solicitations to uphold the ban.

The rule, according to the court, was "reasonable and proper" and had a "rational relation to the orderly operation of the school system."[109] The court did not ask whether such a comprehensive ban had an unduly restrictive effect on speech or whether it was necessary to maintain the central educational purpose of the school; and the degree and type of harm was not made explicit. Even though the rule might be considered reasonable, the fact that it had been in effect for forty-seven years does not alone prove its necessity.

In another case upholding a rule against selling or soliciting in school, an eleven year old student was suspended for three days for selling a newspaper, Protean/Radish.[110] Here, the court failed to note that enforcement of the policy would limit the free exchange of ideas, at least indirectly; and held that there was no First Amendment issue involved. It reasoned that since free distribution was not prohibited, the case raised no constitutional issue. Despite the conclusion reached here and in the previous case, it is arguable that flat bans against sale and solicitation do unduly restrict the flow of ideas in a public forum dedicated to teaching and learning. Such regulation, which goes beyond the reasonable control of time, place, and manner, is probably unnecessary as well as unconstitutional, in most cases.

Although the concept of school as a public forum has yet to be widely relied on explicitly, there are four cases which have invalidated school rules against advertising and promotional activities, the collection of funds, the distribution of materials "commercial in nature," and commercialism and solicitation respectively.[111] The first court used reasoning similar to that found in the prior restraint cases, holding

that the rule was vague and overbroad and did "not reflect any effort to minimize the adverse effect of prior restraint."[112] The second court held that a blanket ban on the sale of papers was an unconstitutional regulation of time, place, and manner which violated the First Amendment per the Supreme Court decision in Tinker. In the last two cases, although the defendants suggested that the bans were necessary to avoid a substantial and material interference with the educational program, both courts held that the outright prohibition of commercialism and solicitation was inconsistent with the First Amendment speech provision. The courts seemed to look beyond the allegations of interference made by the defendants and found that the regulations were unduly restrictive and not necessary. Both courts said that such bans, to be constitutional, would have to be justified by a reasonable forecast of a material and substantial interference.

The above cases recognize, either implicitly or explicitly, that there is something unique about a school. While it may not have the venerable public forum history of a public street or a public park, it is especially dedicated to promoting an exchange of ideas incident to the educational process--something not true of streets and parks. It is perhaps because the students in these public forums are a captive audience that it is especially important to insure that the state not make them the "closed-circuit recipients" of a limited number of ideas. A public school is more than a marketplace, it is a marketplace of ideas--a public forum with a special interest in promoting the intellectual freedom of its citizens. This idea is well expressed by the District Court judge in one of the previous cases.

> A public school is a market place of ideas and early involement in debate and comment and free exchange is essential to the development of the democratic spirit necessary to the proper functioning of our government.[113]

Although a school is only semi-public in the sense that it is dedicated to a particular, specialized, and limited purpose, it is perhaps because of the importance of this purpose to the individual and to society that it deserves at least as much reverence as we give to the great public forums of the street and the park.

Conclusion

The device of prior review, which has unique application to written materials and which has been applied with frequency to the student press, is an extraordinary device. It has a long history of particular disfavor in the legal tradition. Because of the type of environment that is conducive to the educational process and because of the relative immaturity of the students involved, the argument that the student press represents an exceptional case with regard to the issue of prior review is understandable. But this same justification, the promotion of learning among a captive and immature group of individuals, could also be used to argue that prior review is inappropriately repressive. Even if prior review is determined to be desirable, it must be remembered that most attempts to establish criteria and procedures able to pass constitutional muster have failed. A better educational alternative might well be to institute review procedures that serve an advisory function rather than a censorial function. Traditional legal remedies along with an advisory system may have a better chance of protecting and

promoting intellectual freedom, along with other important values, than the potentially more repressive systems of prior review.

Just as the motivation for prior review of the student press is arguably excessively protective, the same argument could be made against blanket prohibitions and ad hoc attempts to regulate student morality by controlling exposure to materials found offensive by school officials. Blanket prohibitions on non-school literature, commercial literature, and the sale of literature, even if well-motivated, represent a philosophical approach to schooling which misunderstands the special public forum function of education in our society. The attempt to impose rigid standards of propriety with regard to the type of speech which is allowable in written materials is probably unnecessary, unwise, and unconstitutional. While obscenity is clearly not protected, the cases show much confusion as to how the judgment of obscenity is to be made. A description of a movie scene where a couple "fell into bed" is clearly not obscene; and while distasteful, neither is most profanity and vulgarity. A review of the cases suggests that until a rationale can be developed by which indecent speech can be constitutionally prohibited, expression will be subject to regulation for traditional reasons only.

Two other issues arising in this chapter concern attempts to regulate the distribution of written materials off-campus and attempts to prohibit the distribution of religious literature in school. The first issue is relatively well settled. While school officials have no greater authority beyond the school boundary, they can regulate those activities which have a substantially deleterious effect on the school's learning environment. The religious establishment issue remains as

unsettled as it was in those similar cases presented in the previous chapter. While the one case which gave thorough consideration to both the religion and speech issues held that religious literature should be treated like all other literature, the cases which emphasized the freedom of religion issue ruled against freedom of speech having a religious content. In a sense, intellectual freedom concerns both freedom of belief as well as freedom of speech. Additional authoritative treatments of cases where these two fundamental values come into conflict may help to clarify their appropriate interaction and to develop the basis for an appreciation of their importance in the promotion of intellectual growth.

The next chapter will deal with intellectual freedom in the classroom--with how teacher freedom or lack of freedom with regard to the curriculum promotes or hinders the learning process. In a sense the focus will shift from the student to the teacher, but in another sense, the focus remains on the student for it is he or she who is always the principal subject of public education.

CHAPTER V

ACADEMIC FREEDOM

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendant value to all of us. . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas."
>
> Justice William J. Brennan
> Keyishian v. Board of Regents (1967)

Introduction

The subject of this chapter is freedom of speech for teachers. Its focus is limited to those speech activities taking place in the classroom or in the school which directly relate to curricular and extracurricular activities in which students are involved. Hence, it will concern teacher freedom with regard to the selection of curricular materials, topics for discussion, and teaching methods; the limits to that freedom; and due process protections for teacher speech. Except in unusual cases it will not concern the teacher's speech or associational activities outside of school even though they may relate to educational issues. In order to maintain the intellectual freedom focus, this chapter will be limited to those speech and speech-related activities by teachers which most directly affect their interactions with students in educational settings. The chapter is based on the assumption that teachers play a key role in developing and maintaining a climate of intellectual freedom in schools, a climate that directly affects the quality of student learning.

The Limits of Teacher Freedom

A case which dramatically illustrates unduly permissive teacher behavior with regard to student speech over which they had control concerns the dismissal of two teachers for their part in permitting a racially inflammatory school program by the school's Black Student Alliance.[1] It presents the issue of the extent to which teachers have an obligation to control certain kinds of student speech. One skit, "Oklahoma Shootout," portrayed the mistreatment of blacks by whites and included the use of the terms "racist pig" and "mother fucker." In a courtroom skit a white judge was referred to as a "racist pig." And in a classroom skit, a white teacher was physically dragged from the room after making derogatory remarks toward black students. The program resulted in considerable disorder. There was a fire, property was damaged, two lunchroom workers were injured, a teacher was hospitalized for smoke inhalation, and the school was forced to close for ten days.

Although the court merely held that a review of the record showed substantial evidence to sustain the dismissals, one concurring judge recognized that freedom of expression was an implicit issue in the case. Where teachers are involved in approving speech which they should forsee will create a material and substantial interference and where they could have prevented such speech, teacher dismissals may be entirely warranted. However, the court's reasoning should not ignore the free speech issue. The court should give explicit reasons for the non-protected nature of the speech and should examine the teacher's behavior in that context. Conclusory opinions such as the one in this case are less valuable as

precedent and will seem unjust in less extreme cases. Although the speech here was arguably licentious, for any number of reasons; those reasons were not detailed. If it is not shown that teachers are able to predict a material and substantial interference, their dismissals will seem unfair and will unduly chill freedom of expression.

In addition to inflammatory speech which either amounts to "fighting words" or which would otherwise create a material and substantial interference, teacher speech which urges non-cooperation with the directives or wishes of school authorities is generally not protected. This proposition can be illustrated by a case where a teacher was not rehired for directing a journalism class to cease publication of the school paper, the B-Liner, rather than have it subjected to prior review.[2] The principal had asked to see the paper prior to distribution because of a rumor that it would be a "hot" issue containing an article about marijuana. Noting that no constitutional issue was involved, the court affirmed the school board's action. The teacher's speech-related activities were not protected because they were insubordinate. In addition, they allowed the court to avoid the constitutional issue of prior review. Although teacher due process will be considered later, for the present it is sufficient to note that a refusal to rehire can be based on almost amy reason or no reason--unless the teacher's fundamental rights are involved--because a teacher without a continuing contract has no constitutionally guaranteed property right.

In a similar case, a tenured teacher made statements to four hundred students who had gathered in the school gymnasium which implicitly contradicted directives of the principal and the superintendent that the

students return to classes.[3] Citing Tinker, the court held that such speech was not protected by the First Amendment because it interfered with the regular operation of the schools. Although the degree of interference was not stressed, the teacher in this case was held properly dismissed for advocating a course of action opposed to that advocated by school officials. And this was true despite the fact that the student disquiet and disruption of normal school activities was apparently induced by the summary dismissal of two popular student teachers who had attended an anti-war rally at Kent State University. The dismissals were based on the fact that they had failed to get official permission to absent themselves from school although they had the permission of their supervising teachers. The decision of the court was apparently not easily reached. "There are disquieting overtones to this case. The atmosphere of Southeast High School appears frighteningly oppressive and the board appears excessively authoritarian and vindictive."[4] But regardless of the extent of repression, the implication of this case is that teachers must support the reasonable directives of their superiors, at least in particularly tense situations.

The next case moves from advocacy of non-cooperation to advocacy of violent action. It involves a teacher, Beauregard Birdwell, who was dismissed because of an anti-military class discussion conducted on a day when military personnel were recruiting. The teacher implicitly and explicitly suggested to his students that they use physical force to induce the recruiters to leave campus. According to the court, the comments were "infused with the spirit of violent action" and not constitutionally protected.

One important question suggested by the situation in the Birdwell case is whether or not speech which is calculated to cause a material and substantial interference with school activities is unprotected even though it appears totally unlikely that such speech could have its intended effect. The court in this case clearly stated that it regarded Mr. Birdwell's speech in the class a disruption per se, apparently because the speech interfered with the prescribed course content. Again there is no explicit finding that the speech created a material and substantial interference as would be required by analogy to the Tinker case. But by focusing on the fact that the extraneous discussion interfered with the learning of algebra and by vague references to "potentially disruptive conduct," the court misses the real point. A teacher's advocacy of violence arguably need not create disruption or interference, in any physical sense, to be constitutionally unprotected. Although it makes good sense to hold teacher advocacy of violence unprotected in elementary and secondary schools, a better rationale will have to be developed by the courts.

The advocacy of noncooperation and violence can be compared with the advocacy of techniques of direct action such as boycotts and demonstrations. In a borderline case, a teacher was not rehired for advising students to demonstrate against a dress code by wearing slacks or blue jeans.[5] The advocacy was held insubordinate and unprotected because it advised disobedience. The case is probably more analogous to the cases where teachers have urged non-cooperation. Another case is more troubling.

Where a teacher was removed from his position as coach of the

swim team for growing a beard, another teacher, Miss Robbins, devoted a total of fifty-five minutes on two days to a student-initiated discussion of the situation.[6] Miss Robbins suggested that the students could demonstrate their displeasure by engaging in a boycott of swimming events. Although the teacher was apparently not rehired for several different reasons, the court was of the opinion that the suggestion of a student boycott of school events would be unprotected speech. The case is not like the earlier case where the teacher suggested that four hundred students not return to the classes from which they were absent without permission. The difference is that here the teacher merely suggested that students might engage in otherwise permissible and protected activity. In other words, if the suggested action is legal, violates no school rules, and does not interfere in a material way with schoolwork, then the advocacy of such action should be protected. Teacher speech, like student speech, should be protected unless it goes beyond the explicit or implicit limitations of Tinker.

Human Sexuality and the Issue of Obscenity

While the subjects of human sexuality and obscenity are only tangentially related from a legal point of view, they are similar to the extent that both involve sex--a subject which is widely considered taboo by adults concerned with the education of elementary and secondary school students. The cases in which these issues arise illustrate some of the most remarkable repression of intellectual freedom to be found in judicial documentation. At times, school officials assume almost unlimited authority to ban the teaching and even discussion of sex-related

issues, to fire homosexual teachers, and to dismiss those teachers who have used materials or engaged in class discussions where controversial speech is involved. While some courts have given due consideration to freedom of speech, others are paternalistic, unduly deferential, and even prudish. Freedom of speech is very often less than enthusiastically protected where sex-related issues are concerned. "No cases have been cited, nor is this court prepared to say, that disapproval of a teacher's sexual references in a high school class, . . ., is a violation of the right of free speech."[7]

In a Florida case involving the mid-year dismissal of a teacher for incompetency and immorality, the teacher had made remarks to a group of "mixed boys and girls relating to sex and virginity and premarital sex relations."[8] While it is conceivable that such comments could be sufficiently immoral to justify mid-year dismissal, the opinion of the court belies this conclusion.

> [A]s to the immorality charge, there was evidence of unbecoming and unnecessary risque remarks. . . in a class of mixed teenage boys and girls which we agree with the School Board were of an immoral nature. It may be that topless waitresses and entertainers are in vogue in certain areas of our country and our federal courts may try to enjoin our state courts from stopping the sale of lewd and obscene literature and the showing of obscene films, but we are still of the opinion that instructors in our schools should not be permitted to so risquely discuss sex problems in our teenage mixed classes as to cause embarrassment to the children or to invoke in them other feelings not incident to the courses of study being pursued.[9]

The court in this case can hardly disguise its irritation with what it considers to be the undue permissiveness of the federal courts. There was no indication that the teacher in this case discussed topless waitresses or embarrassed any student. The court's solicitousness for

the possible "embarrassment" of the students as well as its fear of the possible invocation of "other feelings" suggest that the court's major concern was something other than protecting the constitutional rights of students and teachers. The less obvious but more important result of a case such as the present one is the extent to which the dismissal, if not completely warranted, would tend to chill the speech of other teachers.

In another case a high school biology teacher was denied a continuing contract for the discussion of "illegitimate" subjects.[10] Those subjects included prostitution, masturbation, homosexuality, and gonorrhea. But since the illegitimate topics also included criticism of the School Board and the Superintendent, there is no way to tell whether the issues related to human sexuality would have been considered sufficient standing alone. The teacher was offered an annual contract for the fourth year if he would agree to discuss nothing but biology on school grounds. Although it is generally held that state employment cannot be conditioned upon giving up constitutional rights, the court here held that there was no violation of the teacher's First Amendment right to free speech. While it is probable that the major concern in this case was with biased criticism detracting from the teaching of biology, it is certainly arguable that the limited discussion of sex-related topics was not prima facie illegitimate in a high school biology course.

A similar case occurred at the college level, where a teacher "overemphasized sex" in a health survey course.[11] The court held that there was no right to override superiors on the proper content of a

college course. After the general right of curricular control is conceded, the question becomes how much emphasis is overemphasis and how much speech is unduly chilled by post hoc determinations such as the one made here.

A case raising several important issues involved the constitutionality of a state statute prohibiting giving instruction, advice, or information about birth control to students.[12] Discussion of the topic was completely barred. In addition to allowing for comprehensive school board control of the curriculum, a topic to be pursued later, the court held that the statute was not overly broad. That is, the court apparently felt that the topic of birth control could be completely banned from discussion without violating the First Amendment. No justification was offered.

Another case concerned a teacher who was directed by the Superintendent not to conduct a debate on the subject of abortion.[13] The court held that the teacher's union could not submit the dispute to arbitration because to the extent that the contract made teachers responsible for the general course of study, the contract was illegal. This type of reasoning, which equates general curricular control with curricular decisionmaking power in specific situations, could be used to silence speech on innumerable controversial topics. It is not necessarily inconsistent to say that while the school board retains comprehensive control of the curriculum, the teachers also retain some right to academic freedom. At this point, however, it is sufficient to recognize that this case illustrates yet another way to silence controversial sex-related speech. Arguably legitimate speech is suppressed

by the mere assertion of generalized school board authority. The importance of intellectual freedom is not considered.

There are occasional cases which do recognize the right of public employees to First Amendment freedom of speech where sex-related issues are involved. Two Federal Courts of Appeals have reversed teacher dismissals where one teacher gave a homework assignment to eleventh and twelfth grade English students on the subject of teen-age attitudes toward premarital sex,[14] and where the other discussed homosexuality with boys in an eighth grade spelling and math class.[15] Perhaps the discussion in the latter case was considered appropriate because the class was not mixed. Or perhaps the fact that the teacher was a woman was relevant. There is no question that there has been extensive harassment of teachers known to be homosexual, despite one leading case to the contrary.[16]

Views about homosexuality presented by homosexual teachers themselves are effectively precluded by school boards and courts adept at justifying the transfer or dismissal of most known homosexuals. In a case where the male plaintiff had been a high school English teacher, advisor to the school newspaper, and the play director, the school board adopted a resolution requiring a psychological examination when he became president of the New Jersey Gay Activist Alliance.[17] The court emphasized that "the reasons do not include a single instance of any undue conduct or actions in the classroom or out of the classroom with respect to a particular student."[18] It nevertheless held that the directive was fair and reasonable and did not violate the teacher's free speech rights. The court cited Tinker for the proposition that the

First Amendment guarantees are dependent on the circumstances of each particular case.

> The board does not question the right of the teacher to say or to do any of the things which are mentioned . . . . It simply contentds that . . .[the teacher's] actions display evidence of deviation from normal mental health which may affect his ability to teach, discipline and associate with the students.[19]

It appears that neither the school board nor the court looked at the actual behavior of this teacher or at its effect on classroom activities for evidence of mental illness. The actions referred to are the associational and speech activities themselves.

In another case, a homosexual teacher who had made several public statements about homosexuality was transferred to a non-teaching position.[20] The teacher had appeared with his parents on a Public Broadcasting System program designed to help homosexual children and their parents cope with the special problems associated with homosexuality. Although the court held, citing Tinker, that the teacher's speech was protected because there was no substantial interference with teaching or any reasonable forecast of such, it denied relief. Because the teacher had intentionally omitted his college membership in the "Homophiles of Penn State" from the portion of the teaching application asking for extracurricular activities, his constitutional attack was precluded. The court held to this position despite the fact that school officials admitted that if the teacher had listed the membership, he would not have been employed.

One can only imagine the severity of the punishment if a homosexual teacher attempted to speak of homosexuality in the classroom. These

cases have dealt only with situations where homosexual teachers have merely been involved in associational and speech activities intended to educate the general public. And yet these teachers, if they allow their homosexuality to be known, are almost universally denied the right to practice their chosen profession. If there are good reasons for barring homosexual teachers from the classroom, they should be tested by constitutional standards and not evaded by disingenuous charges of intent to deceive. With very few exceptions, the present situation with regard to homosexual teachers allows only two alternatives: the permanent and complete chilling of speech related to homosexuality by homosexual teachers both inside and outside the classroom, and the abandonment of teaching as a profession.

The next several cases are variations on a theme. They all involve, in the words of one court, "a four letter word, beginning with the letter "F," being an extremely vulgar word meaning sexual intercourse."[21] These cases do not involve the teaching of subjects related to human sexuality nor are they directly related to the legal issue of obscenity. They nevertheless are related to the earlier and later cases in this section because they involve a sex-related word.

In the first case a teacher was fired in mid-year for requiring two fifth graders to write a vulgar word a thousand times as punishment for using it.[22] The court held that the situation presented ample evidence of incompetency, and that the teacher had no academic freedom right to the use of vulgar words which had no purpose. Even if the teacher's poor judgment is conceded, the court's level of scrutiny can still be questioned. The court held that the school board's action had a

rational basis that was supported by substantial evidence. Where a teacher's property and liberty rights and the right to academic freedom may be involved, courts should arguably look for more than mere rationality.

A more sophisticated educational lesson was attempted by a fifth grade teacher who, upon finding a note circulating among her students, explained that the "vulgar colloquialisms" it contained were not necessarily offensive in all circumstances.[23] The teacher was held properly demoted pursuant to a state statute which prohibited "neglect of duty" and required that teachers maintain discipline and encourage morality. While the court did note that the application of the statute would vary with the context, age, and maturity of the students, no consideration was given to the possible free speech issues involved and no substantial degree of harm was required. In the words of one concurring judge, "our dockets cannot afford the time and effort to grind such petty grist."[24]

By way of contrast, the action of a teacher who explained the meaning of "taboo" to his eleventh grade English class by writing the word "fuck" on the board was protected.[25] In holding that the teacher was not guilty of "conduct unbecoming a teacher," the court said that it saw no alternative for "a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech."[26] In making this determination the court considered the relevance, purpose, and effect of the word's use; and the age, maturity, and sophistication of the students. Although the court recognized that "free speech does not grant teachers a license to say

or write in class whatever they may feel like," it also said that discharge of teachers could not be predicated on mere disapproval of speech-related activities by school authorities.[27]

Of course it is well-settled that the use of speech which is legally obscene in the public school context would not be protected.[28] The Supreme Court has consistently held that obscenity is not protected speech in any context.[29] The problem is how to define obscenity. It will not do to repeat the simple assertion of Justice Stewart--"I know it when I see it."[30]

In the leading case of Keafe v. Geanakos, the First Circuit Court of Appeals found that the offensive word--"a vulgar term for an incestuous son"--was used in an article which was "in no sense pornographic;" that the word was "important to the development of the thesis;" and not "unknown to many students in the last year of high school."[31] In Parducci v. Rutland, the short story assigned by the teacher to her class of high school juniors contained "several vulgar terms and a reference to an involuntary act of sexual intercourse."[32] In holding that the story was not obscene, the court said that "[t]he slang words are contained in two short rhymes which are less ribald than those found in many of Shakespeare's plays. The reference in the story to an act of sexual intercourse is no more descriptive than the rape scene in Pope's 'Rape of the Lock.'"[33]

Since the mere appearance in curricular materials of words widely considered to be vulgar will not make the materials legally obscene, the question of what constitutes obscenity is still not resolved. Most of what has been considered by school boards as obscene has been held

not to meet that legal definition. In addition to the above cases, for example, MS magazine was held not obscene.[34] And federal court judges are divided on the question, as can be illustrated by the case of Brubaker v. Board of Education.[35]

In this case three teachers were fired for distributing a "Woodstock" brochure to eighth grade students. The mid-term discharge was accomplished by a board who felt the brochure was "obscene and improper" reading for eighth graders. Some of the objectionable sections, taken out of context, are as follows: "Woodstock felt like home. A place to take acid. A place to make love. . . . Bodies naked into the water, touching each other. . . moving together we're a big fucking wave. . . . Old world crumbling, new world being born."[36] Although a determination of obscenity must be made by considering the work as a whole, this was apparently not the procedure followed here. To the teachers' objection that the board should have reached its conclusion of impropriety with the benefit of expert opinion in the fields of literature, obscenity, and drugs, the court responded: "Experts should not be needed to support a conclusion that is obvious."[37]

At least one person who did not consider the conclusion obvious was a dissenting judge. He stated that the brochure was not obscene in the legal sense.

> The use of profanity does not transform the controversial into the obscene. . . . Even assuming the continuing validity of the variable obscenity doctrine, and making the widest allowances for the age of plaintiffs' students, neither the brochure as a whole nor the poem "Getting Together" begin to satisfy the Miller criteria.[38]

In sharp contrast to the immediately preceding case, a California

court protected a teacher from a mid-year dismissal for her actions in allowing a group of eighth graders "to write directly on a ditto sheet" that would later be duplicated for class discussion.[39] The students, who were in a special class for poor readers, apparently took great pleasure in writing stories containing references to male and female sex organs and to the sex act.[40] A dissenting judge felt that the stories were legally obscene unless that word is "a semantic fiction, wholly unrelated to any reality,. . ."[41]

The decision of the court can perhaps best be understood by considering the concurring opinion of one judge who considered the particular situation in great detail. The students were poor readers, thirteen to fourteen years old, largely from impoverished neighborhoods in a relatively large city, and they used vulgarity in their everyday interactions.

> We should also consider that in this world there are many cultures and many concepts of what is acceptable sexual conduct, and of what sexual conduct may be the subject of free and open discussion or publication in folklore or literature. It may be impossible to impose one strict moral code on all of society, and we may have to acquaint ourselves with, and accept, without puritanical prudery, as natural to them, the standars of others.[42]

Although the majority opinion made no explicit finding on the obscenity issue (which was probably a close one), it held that because there was no disruption or impairment of discipline and no significant danger of harm to the students, the teacher did not demonstrate "evident unfitness for service."

This case represents an exceptionally protective approach to the preservation of academic freedom. It suggests, indirectly, that there

is more to be considered than the offensiveness of the language and that what is obscene in one classroom may not be obscene in another. It perhaps also suggests that even if the materials are obscene, they represent, at most, one instance of poor judgment. Imagine the dilemma faced by this teacher, who had promised in advance to distribute student writing, only later discovering that it was offensive. This is how the actual teacher described the situation.

> I could either say "This is vulgar language, it's dirty writing, it's bad, you are bad, your writing is no good, I am going to throw it out and I never want to see anything like that again." I could say that and I think that would be the ordinary teacher's response. . . . [B]ut I was in a classroom day after day after day and fighting a fight that I was losing and caring that I was losing it, and so I felt, "Well I have to do something. I have to somehow reach these kids. . . ." And so I said, "I am willing to take a risk. I am going to say to these kids "What you did is not evil. You are not evil. The stuff you wrote is not evil, . . ." I felt for one day I had a classroom of kids that were reading and writing as hard as they could and as fast as they could. . . .[43]

The California case considered above is exceptional because it considered the teacher's motivation. In addition, it considered the adverse effect on the students, the degree of such adversity, the extenuating or aggravating circumstances, the likelihood of a recurrence of the questioned conduct, and the impact of the discipline on the constitutional rights of the teacher involved and on other teachers.[44] These are the kinds of considerations that are necessary if intellectual freedome is to be promoted in public schools.

The Question of Academic Freedom

Academic freedom for elementary and secondary school teachers is confined to the generalized free speech right to teach, to speak freely, and to independently select at least some materials and methods for classroom use.[45] The minority opinion appears to be that school boards have complete authority to control not only the general content of every course offered in school, but the selection of every piece of writing to be read and every topic to be discussed. Thus one court held that because the school board was responsible for courses of study, a teacher could not conduct a debate on the subject of abortion.[46] In another case, where a teacher challenged a state statute prohibiting instruction or discussion of birth control, the court held that the teacher's First Amendment rights were not violated by the prohibition because the teacher had no independent right to select subjects for instruction.[47] In addition, the teacher was prevented from raising the right of the students to hear and to know by the judicial policy which denies standing to third party challengers. Some important Supreme Court cases have recently been decided on the question of standing, which would now allow the argument to be made that teachers should be permitted to raise the constitutional rights of students.[48] Students will often lack the resources and the motivation for a court challenge. And by refusing to discuss birth control in response to a student question, for example, the teacher is arguably being forced to deny the student's right to know as well as his or her own right to speak.

The almost absolute denial of independent academic freedom rights

to teachers has been followed in the less speech protective line of library cases as well. Where librarians have joined students, parents, and others to protest the removal of books from libraries, courts which have considered the issue have generally held that librarians have no independent First Amendment right to control the collection of the library under the "rubric of academic freedom."[49] This dichotomous approach, which grants authority to one group and denies authority to another, can be sharply contrasted with a growing number of cases since 1969 which contributes to the developing consensus that teachers have some measure of academic freedom.

In the earliest case Keefe v. Geanakos, the First Circuit held that the conduct of the plaintiff teacher in assigning a controversial article from the Atlantic Monthly to his senior English class was protected as a matter of academic freedom.[50] Although the article contained a "vulgar term for an incestuous son," the court found it to be a "valuable discussion of dissent, protest, radicalism and revolt."[51] It was not pornographic, obscene, or shocking, and the objectionable words were not used gratuitously. Although some parents may have been offended, the court admonished the school board that the sensibilities of parents were "not the full measure of what is proper education."[52]

The next important federal court case to base its holding on the academic freedom of a teacher was Parducci v. Rutland. The case substantively clarified the meaning of the term "academic freedom." "Although academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate and to study is

fundamental to a democratic society."[54] The court continues by giving the quote from Keyishian with which the chapter opened. "Our nation is deeply committed to safe-guarding academic freedom, which is of transcendant value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[55] In affirming the right of a teacher who had assigned Kurt Vonnegut's story, "Welcome to the Monkey House," to her eleventh grade English classes, the court said that "the safeguards of the First Amendment, will quickly be brought into play to protect the right of academic freedom because any unwarranted invasion of this right will tend to have a chilling effect on the exercise of the right by other teachers."[56] The court used the material and substantial interference test as a guideline in determining the extent of the teacher's right. It found that there was no interference with the orderly atmosphere of the school setting and no invasion of the rights of other students. In addition, the court determined that the story would not interfere with the emotional development of the students because it was neither inappropriate nor obscene. The story presented no social danger because nothing illegal was advocated. And there was no danger to intellectual development because no attempt had been made to propagandize. The dismissal was held to violate the First Amendment rights of the teacher.

Academic freedom has also been used by courts to protect a high school drama coach from dismissal for allowing the production of a play with drinking scenes and vulgarity;[57] to protect a student teacher who made "unorthodox" statements saying that he was agnostic and approved

the Darwinian theory;[58] to prohibit the dismissal of a Catholic priest who read an autobiographical story recounting the funeral of a student who died of a heroin overdose and which contained a "slang expression for an incestuous son;"[59] and prevented school officials from attempting to restrict a teacher's use of Catcher in the Rye.[60]

Some courts prefer the more traditional language of freedom of speech or expression, but regardless of the language used, a teacher's right to teach has often been protected. Thus, a teacher was permitted to invite additional speakers to a political science class to represent diverse views.[61] And a high school civics instructor was protected when, in response to student questions, he said that he did not oppose interracial marriages.[62] This teacher believed that it was not possible to teach seniors about current events without discussing controversial issues such as repression of anti-war dissent in the armed forces, and race relations. The court balanced the rights of the teacher with educational needs.

> A teacher's methods are not without limits. Teachers occupy a unique position of trust in our society, and they must handle such trust and the instruction of young people with great care. On the other hand, a teacher must not be manacled with rigid regulations, which preclude full adaption of the course to the times in which we live.[63]

But academic freedom, even where recognized, will not protect all teacher speech in the classroom, as is illustrated by the following two cases.

In the case of Carey v. Board of Education, a United States District Court judge eloquently discussed the vital importance of academic freedom.[64] After arguing for the relative importance of the teacher qua

employee compared to employees in the private sector based upon the nature of the product (e.g. automobiles versus well-educated students), the judge ignored the importance of the distinction.

> Thus, a teacher may bargain away the freedom to communicate in her official role in the same manner as an editorial writer who agrees to write the views of a publisher or an actor who contracts to speak the author's script. One can for consideration, agree to teach according to direction.[65]

Judge Marsh viewed the prohibited use of certain books for eleventh and twelfth grade elective courses as a simple contracts case. He held that because of a collective bargaining agreement the teachers had bargained away their right to participate in the selection of curricular materials.

> But for the bargained agreement, the plaintiffs would prevail here. The selection of the subject books as material for these elective courses in these grades is clearly within the protected area recognized as academic freedom. . . .
>
> Because of the bargained agreement the plaintiffs' claim must be denied. Whatever may be the scope of the protection of the First and Fourteenth Amendments for a freedom to communicate with students directly in classroom speech or indirectly through reading assignments, such protection does not present a legal impediment to the freedom to contract.[66]

This is an astonishing conclusion after several pages replete with dicta about academic freedom and the beneficial effects of protecting intellectual freedom in the schools. Even if freedom of communication is a permissible subject for negotiation, the holding that it can be completely given up by either party is certainly subject to question. The problem with allowing teachers to bargain away this right is that it also interferes with the right of the students to know. First Amendment free speech rights are of a reciprocal nature. It is arguably against public policy to permit the waiver of another's rights in the

circumstances of this case.

In the other case where teacher rights were not protected although academic freedom was recognized, a black high school teacher was dismissed after having taught for fifteen years.[67] His dismissal was based on the following statements:

> Integration in churches and classrooms came recently, but in bed for a long time because if a white man wanted a little loving he would go across the tracks.
>
> The black man has had the idea that only white women could love adequately because of picture shows. Until recently there were no black women in movies.
>
> Black girls have more illegitimate children because they can't afford to have anything done as white girls do.
>
> Obscenity and vulgarity are needed to motivate people.[68]

One can readily admit that the teacher's right to academic freedom is not absolute, and still question the summary dismissal of this teacher. "We believe that the findings noted above are examples of acts which need no regulation to define their indecorum."[69] The case suggests the question of whether or not the right to academic freedom and freedom of expression in the classroom can be overcome by the mere assertion that speech was improper or indecorous. If this case were typical, free speech would not long remain in the preferred position it has generally been given.

There are, of course, legitimate limitations to the teacher's freedom of expression in the classroom. "The teacher's liberty is not a license, either as formalized authority or as an undisciplined freedom, and limitations on the manner of its exercise are required to achieve the purpose of academic freedom."[70] Teachers cannot falsely shout

"fire" in the classroom. They cannot interfere in any other way with the physical safety of the students--they cannot advocate violence, for example. And teachers also have the duty to promote the social and emotional growth of the students, so that the advocacy of noncooperative and illegal acts can generally be prohibited. In addition, since the teachers have the primary duty to protect the process of intellectual exchange itself, they must not do anytning that would deny the students the fundamental opportunity for intellectual growth. Some limitations are necessary to achieve the primary purpose of academic freedom itself.

There are two major ways that the process of intellectual freedom could be thwarted by the teacher. It could be thwarted passively by simply not teaching the prescribed course content, or actively by proselytizing or indoctrinating. Since propagandistic materials, if used for indoctrination, would stifle free communication and be inimical to the development of free intellect, they could properly be excluded.[71] A closely related concern is that teachers not use the classroom as a springboard for their personal criticism.[72] And whatever the subject matter involved, several cases suggest that the materials should be relevant to a legitimate educational objective and not inconsistent with the general purpose of a course.[73] These cases represent a concern that there not be a substantial interference with the intellectual development of the students. As it was colorfully stated by one court, the teacher is not "invested by the Constitution with [a] right. . . 'to teach politics in a course in economics.'"[74]

This does not mean, however, that a teacher can never discuss subjects of general political or social concern. Where teachers were

prohibited from answering student questions regarding negotiations, the court held that their First Amendment speech rights were being violated absent a showing that a material and substantial interference would result.[75] Another court had a similar opinion.

> [I]nvoluntary restrictions on the individual liberty of teachers and students to communicate, directly or indirectly, where such open expression is consistent with attained level of educational development, are matters of constitutional concern.[76]

Academic freedom, in the sense of the freedom to teach and to discuss a wide variety of issues with students, has been comprehensively protected by many courts in the post-Tinker period. When freedom of communication is not protected by school officials or courts, it often appears to be because the desire for order or absence of controversy has been allowed to obscure its vital role in the process of intellectual development itself. To legitimately prohibit or interrupt speech in elementary or secondary schools, a showing of substantial interference with the legitimate objectives of education in a democratic society should be required.

Due Process for Teachers

Although several important cases have established that teachers who have property rights (contract or tenure) or liberty rights (good name or reputation) are entitled to a hearing before dismissal,[77] this is not the subject of this section. The issue here is whether or not it is reasonable to deprive a teacher of liberty or property if the teacher had no notice or reason to know that the activity he engaged in might legitimately be considered inappropriate. Several cases from the

early 1970's evidence a concern that teacher speech be protected in borderline cases where there have been no standards for guidance and where the speech is not patently unprotected. Although the motivation in these cases is partly to insure participation and accuracy in dismissal or demotion proceedings, the primary purpose of this due process protection is to preserve the fundamental right of intellectual freedom.

> This exclusively procedural protection is afforded to a teacher not because he is a state employee, or because he is a citizen, but because in his teaching capacity he is engaged in the exercise of what may plausibly be considered "vital First Amendment rights." [citations omitted][78]

The earliest case to deal extensively with this issue was Parducci v. Rutland, where the teacher's right to academic freedom was held to justify her use of Kurt Vonnegut's "Welcome to the Monkey House," which had been considered by the principal to be "literary garbage."[79] The court was concerned about what it called a "total absence of standards" by which a teacher could know what conduct was proscribed.

> Our laws in this country have long recognized that no person should be punished for conduct unless such conduct has been proscribed in clear and precise terms. When the conduct being punished involves First Amendment rights, as is the case here, the standards for judging permissible vagueness will be even more strictly applied.[80]

The court went on to observe that valid educational interests would not be served by allowing school administrators "unfettered discretion to decide how the First Amendment rights of teachers are to be exercised."[81] It emphasized the chilling effect on intellectual freedom in the classroom that such unlimited discretion would have.

> When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on the part of the teacher to investigate and ex-

> periment with new and different ideas is anathema to the entire concept of academic freedom.[82]

The next important case on this issue, Mailloux v. Kiley, held that because the teacher's conduct in explaining the concept of taboo by writing a four-letter word on the board was "within standards responsibly, although not universally recognized, and. . . he acted in good faith and without notice," his dismissal would be a violation of due process.[83] The lesson of the Parducci and Mailloux cases has been heeded by several other courts.[84] Because of the importance of academic freedom to the process of education, where the teacher's speech activity arguably falls within standards recognized as reasonable, it should be protected unless there was notice to the contrary.

The above rule of law has two important corollaries. First, it is not necessary to have a rule in all cases in order to give notice of the unprotected nature of teacher speech activity. As the court said in Keefe v. Geanakos, "It does not follow that a teacher may not be on notice of impropriety from the circumstances of a case without the necessity of a regulation."[85] Although this is undoubtedly true, the Keefe case does not say which speech activity is so obviously inappropriate that prior notice would not be needed. It is probable that speech which has been traditionally unprotected, such as obscenity, and speech which would create a material and substantial interference would not have to be proscribed by a specific rule.

The second corollary to the above rule is that any regulations which are promulgated to define protected and unprotected teacher speech must meet constitutional standards. If this is true, one wonders, by

analogy to the attempts to establish rules for prior review of the student press, whether or not such regulation of teacher speech is either possible or necessary. The point is that it may not be constitutionally or practically possible to proscribe teacher speech other than that which is unprotected by Chaplinsky and Tinker.[86] And that speech which is unprotected by Chaplinsky and Tinker is very likely just the sort of speech for which written prohibition is unnecessary.

The effect of the line of cases requiring that teachers be put on notice in borderline cases as a matter of due process certainly has the potential to protect academic freedom. The problem, as always, is that the use of precedent can be perverted. A case which illustrates this especially well is the recently discussed case where the black teacher with fifteen years teaching experience was fired for statements he made to his high school class about interracial sex, illegitimacy among poor black girls, and the social need for profanity and vulgarity.[87] The court cited the Keefe case for the proposition that "a classroom teacher, merely by the nature of that position, should be aware of the impropriety of some practices."[88] It then asserted the impropriety without analysis. "We believe that the findings noted above are examples of acts which need no regulation to define their indecorum."[89]

While it may very well be true that there was no need for a regulation in the above case, there certainly was a need for a constitutional justification for dismissal. In an apparent attempt to justify the summary nature of the conclusion regarding First Amendment rights, the court cited the Tinker case.

While the First Amendment rights in the schools are of great

> importance,[citations omitted] the right of free speech is not absolute, but is limited by state regulatory control that is not unreasonable or irrational.[90]

But the Tinker case stands for the proposition that in order to regulate in the First Amendment area, where important intellectual freedom rights are concerned, what is reasonable must meet a very high standard. The due process cases considered in this section recognize the importance of these rights.

The Teacher's Freedom of Speech: Protected and Not Protected

One of the most quoted passages of the Tinker decision is the assertion that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[91] But despite this dictum, a teacher was discharged for his action in wearing a black armband to class to protest the war in Vietnam.[92] The dismissal was justified by the belief that the expression of political views was not appropriate in a public school. Perhaps not surprisingly, a federal court of appeals held that the First Amendment protected the teacher's action.

> Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers.[93]

The court commented on the fact that there had been no proselytizing, no deliterious effect on teaching, and no disruption. In addition, it voiced the opinion that the discussion of controversial issues was necessary to the educational process.

Along with students, and despite some additional considerations, teachers are also protected in their right not to speak. This is true even though their actions may be controversial. Where a teacher was discharged because of a refusal to participate in the pledge, a court ordered reinstatement.[94] "[T]he right to remain silent in the face of illegitimate demand for silence. . . ."[95] Here again the court noted that this was a passive action on the part of the teacher. There was no attempt to proselytize, and tenth grade students would not be unduly influenced by the action. In addition, the court felt that controversy was not to be dreaded in classroom situations. By protecting controversy, these courts, like the Supreme Court in Tinker, recognize that our national strength derives from our "relatively permissive, often disputatious, society."[96]

In another case where controversy was central, school authorities had created a forum for the speech of teachers and others on a wide variety of issues.[97] Despite the invitation to open discussion, a teacher was transferred for speaking on the dress and grooming code, the outside speaker policy, and the school paper. The punishment was effected for the creation of "disharmony and friction." But this court, too, protected controversial speech in the public school environment and nullified the transfer.

> Priorities place constitutional rights above unlimited administrative authority to act in their derrogation. Disharmony and friction are the healthy but natural results of a society which cherishes the right to speak freely on a subject and these resultant by-products should never prevent an individual from speaking or cause that individual to be penalized for such speech. Any attempt to do so abrogates the protections that the First Amendment affords to all.[98]

Teachers are protected not only from discharge, but from any other significant punishment, when they are exercising their constitutional rights. And their constitutional rights do not end where controversy begins.

Where teachers themselves are not engaged in controversial speech but are advising students engaged in press activities, for example, they apparently get First Amendment protection derivatively. Where a teacher encouraged an honors English class to publish a paper outside of school even though the principal was "quite opposed" to underground papers because they tend to "deteriorate," the teacher's contract was not renewed.[99] The paper, called Catharsis, contained several short articles on sexual equality, football, free press, and ecological issues--hardly evidence of deterioration. But whether or not the paper would "tend to degenerate," since it was a legitimate and constitutionally protected activity, the teacher's acts of assistance and association were held permitted by the First Amendment.

The other side of this issue is that teachers can also be held responsible for the press activities of students under their control. Where a teacher was dismissed for allowing an article to appear which criticized the disciplinary actions of certain teachers--the "Old Meany Master" article--the court held that the lack of censorship was evidence of incompetence.[100] The court considered the Tinker case, deciding that personal attacks on members of the faculty were not permitted because they would create a material and substantial interference with discipline and a collision with the rights of others. Because the conclusion here was arguably based on nothing more than "undifferentiated fear," it

illustrates that the derivative First Amendment protection is beneficial only to the extent that courts are willing to place intellectual freedom in a preferred position.

The final case in this section, one of the few to arise in the elementary school context, illustrates the extreme repression of student and teacher speech by some school administrators. A second grade teacher with twenty-five years of experience was discharged for allowing a student to write a letter to the school cafeteria requesting raw carrots; for showing the principal student cartoons showing wilted flowers as a protest against a broken water fountain; and for voicing concern about an open incinerator in the middle of the playground.[101] A Federal District Court in Arkansas held that the teacher had a First Amendment right to engage in all of these activities.

Conclusion

Teacher freedom of speech in the classroom and the corresponding rights of students to know have been given increased protection by the growing recognition of a generalized right to academic freedom. Although academic freedom for the teacher may not provide any additional First Amendment rights, the new terminology has connotations of reciprocity and interaction which are especially appropriate for encouraging intellectual freedom in an educational context.

Teacher freedom, of course, is not absolute and may be limited where it creates a material and substantial interference with the learning environment. Beyond this, it can be argued that an expanded material and substantial interference test would help courts to balance

freedom of speech for teachers with the state's interest in promoting the emotional, social and intellectual development of students. For example, non-disruptive teacher speech which advocates disobedience to school rules or which involves indoctrination is ill-suited to prohibition by the traditional Tinker disruption limitation. An expanded material and substantial interference test might be useful in situations such as these which do not look toward the protection of the learning environment so much as toward the promotion of student growth.

An expanded test could also be helpful when dealing with the sensitive issues of sex education, sex-related language, and sexual preferences of teachers. The question would be whether the speech activity would have a material and substantial negative effect on the emotional or social development of students. The issue of obscenity is separable and clearly unprotected. While what is obscene for minors is difficult to define apart from a contextual situation, it appears from the cases that teacher speech which is legally obscene is almost non-existent.

The role of the collective bargaining process in promoting intellectual freedom is an emerging issue. For the immediate future, courts which interpret state legislation as granting complete curricular control to school boards can be expected to view curricular issues as impermissible subjects of bargaining. In states where these issues are bargainable, courts will need to define constitutional limits which will assure the protection of the students' right to learn.

The last major post-Tinker development to affect intellectual freedom in the classroom is the emergence of an especially speech-protective notion of due process for teachers. It is applicable where teachers

have engaged in speech-related activities that, while not clearly protected, are not amenable to easy analysis and disapproval under the Chaplinsky or Tinker doctrines. In these cases, in order for teachers to be punished for engaging in speech-related activities, they must have clear notice that their behavior has been validly proscribed. It is the protection of academic freedom that has provided major impetus for the judicially created notion of a special First Amendment due process right. In borderline cases, fairness to the individual arguably requires such a result as a matter of principle, and the protection of academic freedom requires such a result as a matter of public policy.

CHAPTER VI

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

> We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge,--or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget.
>
> Judge Benjamin Cardozo
> Paradoxes of Legal Science (1928)

The humanitarian instincts of the first half of the twentieth century led to much needed reform in the way our society dealt with children and other less competent or mature individuals. While it is undoubtedly true that children are especially needful of protection, it is also important to remember that children grow more and more competent as they mature socially, emotionally, and intellectually. The special importance of Tinker v. Des Moines, more important than the holding or the Tinker test, is that the majority recognized and reasserted a philosophy toward children which respects their individuality and uniqueness as people.[1]

Although a great many people throughout the first half of the century believed that children were properly subject to almost complete control by their parents and the state, the Tinker court denied that assumption by asserting the personhood of children. "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ."[2] The majority opinion of Tinker is a powerful reminder that neither the state nor the parents of a child can exercise unfettered authority with

regard to the children under their control. Even though children are less mature than most adults, they still deserve respect as human beings and they still have fundamental constitutional rights.

The concurring opinion of Justice Stewart in the Tinker case represents an alternative point of view. It illustrates a major philosophical difference of opinion between him and the Tinker majority with regard to student rights. Justice Stewart bemoans what he feels is the "Court's uncritical assumption that. . . the First Amendment rights of children are co-extensive with those of adults."[3] He believes that because children are not "possessed of that full capacity for individual choice" their rights must necessarily be more limited. Of course, from a practical point of view this is often true. Children can't vote and they can't marry at any age they choose. But Justice Stewart would apparently limit the rights of children in theory as well as in practice, and this limitation would have profound consequences.

The Tinker majority began with the philosophical assumption that children are persons who deserve the protection of fundamental constitutional rights. This more libertarian philosophical assumption assures that any limitation of the rights of children in particular situations will require adequate justification. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[4] Even the case of Ginsberg v. New York, which influenced Justice Stewart, held only that the state had the power to define prohibited obscenity in context.[5] And since the context in that case involved the dissemination to minors, the determination of obscenity was adjusted to meet the particular situation.

The point is that the principles remain the same. Even though the power of the state to control the behavior of minors goes beyond its power to control adults, that proposition is not a statement of principle and it is not self-executing. Judgments have to be made based upon principled assumptions. And the assumption that is most congruent with our liberal, democratic values as expressed in the Constitution is that children are possessed of fundamental rights which must be respected. As their right to speak, for example, is adjusted to accord with the special characteristics and needs of the school environment, Justice Stewart's simple assertion that children don't have the same rights as adults do will not be adequate justification. Constitutionally sufficient reasons will have to be given to validate the denial of a student's fundamental rights.

Contrary to implications that can be drawn from Justice Stewart's opinion, the Tinker majority does not argue that students should be able to exercise their speech rights in exactly the same way as adults generally may. The majority recognizes that the special needs of the school's learning environment and the fact that students constitute a captive audience will require the making of unique adjustments. But the basic assumption of the Tinker court is that all persons have fundamental rights. And it is this assumption rather than the one often derived from Justice Stewart's opinion that best accords with the liberal belief in human dignity and equality.

In addition to asserting that students are persons and that they have rights, the Tinker majority reasserted the rights of teachers as human beings and as citizens. Just as it had been assumed that students had few if any rights while in school; it had long been assumed that

teachers, by virtue of their occupational status, had fewer rights as well. In a statement that has been repeated in scores of teacher rights cases the Court in Tinker declared: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[6] Both students and teachers have the right to speak out--to give their opinion--on a wide variety of controversial social and political issues. They may talk about war, about abortion, and about evolution, as long as the expression does not fall outside of the realm of protected speech and as long as there is no substantial interference with the school's learning activities. And this assertion of rights has been generalized to protect fundamental teacher rights in addition to speech as well.

The students also have an emerging right to know, which supports and enlarges the teacher's right to speak. And they have a right to privacy which imposes special obligations on teachers and other school officials to carefully weigh the various interests involved before engaging in speech activities. This can be accomplished in the more typical situations by looking to speech which has been traditionally unprotected, as defined by Chaplinsky (obscenity, defamation, and fighting words), or by asking whether the speech is likely to create a material and substantial interference with good order and discipline, as has been prohibited by Tinker.[7] But where speech which potentially threatens the emotional, social, or intellectual development of students rather than the peace of the learning environment is involved, it can be argued that the Tinker test will have to be extended to allow proper consideration of competing rights. Indeed, there is evidence that the courts are beginning to make

these more inclusive applications.

The types of situations where an extended application of the Tinker text would be most useful involve, for example, the distribution of an anonymous survey on student attitudes toward sex and the use of short stories with "sophisticated" language or themes. Although these situations will not threaten peace and good order, they may threaten or appear to threaten the emotional development of students. It will not be easy to resolve these issues. Non-material concerns are subject to less exact measurement than material disruptions. And there is less agreement among educators and psychological experts as to what would amount to a substantial interference with the emotional or social development of students. But the preservation of intellectual freedom requires that flexible standards be developed and implemented. Even if the Tinker test was not initially created for application to situations other than those which threaten physical disruption, the general import of the decision would require that all restrictions be accompanied by substantial justification, not a mere assertion of reasonableness. And because the protection of intellectual freedom in a public or semi-public forum dedicated to teaching and learning is of special importance, the general presumption must always favor freedom of expression and intercommunication. There is even more at stake in these cases than important individual rights. The interests protected by the First Amendment speech provisions have both individual and social relevance. We all benefit from an intellectually free and capable citizenry.

These dual interests for the protection of free communication have been recognized and given special support by courts at all levels in

about half of the well over a hundred cases considered in this paper. This speech protectiveness does not appear to be the province of any one state, or of any one district or circuit. It could plausibly be suggested that the spirit of the Tinker case has permeated all sections of the country, at least to the extent that half of the cases concerning intellectual freedom in public schools seem to rely on its egalitarian and speech-protective philosophical approach.

On the other hand, and by contrast to this relatively high level of protectiveness, about a quarter of the cases considered show very little inclination on the part of the courts to protect either speech or individual rights. They show too little appreciation of speech values, and excessive deference to the overly paternalistic and protective judgment of school officials. As has been noted previously the facts of many cases suggest that school officials frequently overreact in situations where controversial speech is concerned, evidencing a desire to maintain perhaps unreasonably high levels of order and control. In addition, the existence of blanket prohibitions and prior review policies, for example, tend to suggest possible undue paternalism. When courts decline to intervene in these situations, they frequently cite the following language from the Supreme Court case of Epperson v. Arkansas: "Courts do not and cannot intervene in the resolution of conflicts which arise in daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[8] When the courts show less judicial deference with regard to decisions of public school officials, they cite this language from the same case:

> Judicial interposition in the operation of the public school

> system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief.[9]

A lack of appreciation for the function and importance of freedom of communication in public education is shown by the courts in various ways. They often ignore or fail to appreciate that speech issues are involved. They claim that a regulation of speech is reasonable with no regard for the high level of preference given to the fundamental right of free communication. Or they circumvent the spirit of the First Amendment and the Tinker decision in other ways. While the large number of cases which are relatively speech-protective may be encouraging, it could be argued that the cases where student or teacher speech has been protected involve unusually blatant violations of constitutional rights, thereby artificially inflating the percentage of speech-protective cases. On the other hand, these cases might never have come to court in the pre-Tinker period. But while the effect of Tinker can be debated, the fact that a quarter of the cases show almost total disregard for the fundamental rights of students and teachers indicates that there is a great deal more to be done to encourage an optimal level of protection for intercommunication in educational settings.

During the course of this investigation several issues have arisen which seem worthy of extensive individual treatment in the future. Some of them would involve quasi-empirical or historical research and some would involve the construction of theoretical, constitutional arguments. The possibilities for further study, therefore, are both theoretical and applied; and while they all involve issues of law and education, some

are more educational in nature and some more legal.

A major issue which suggests itself for consideration is how to balance the rights of students inter se. This will involve deciding which students are entitled to exercise their rights when they conflict with the rights of other students; and it will involve determinations as to whether or not a particular right will have to yield so that school officials can promote either a conflicting right in the same individual or the general welfare of another student or group of students. Once fundamental legal rights of students have been authoritatively established, the problem of judicial balancing in a particular case involves educational and psychological issues in addition to primarily legal ones. The case where students wanted to collect and publish information on student views regarding human sexuality is a good example of the need for this type of information in a situation where several rights were in potential conflict. The student researchers had a right to gather and disseminate information, and other students had a right either to receive information or to be left alone. Since school officials have a duty to promote the fundamental rights of students as well as to promote their general welfare in other ways, it is they who must determine initially how to resolve these types of conflicts. Even though fundamental constitutional rights such as those protected by the free speech provisions are given preference, the decisions of school officials, and ultimately of courts, will have to reflect a consideration of various social issues in addition to legal principles when these rights conflict. Whether the questionnaire would provide a non-threatening opportunity for students to think about sexual concerns and to exchange

views, or whether it would provide the stimulus for emotional injury can only be decided by considering educational and psychological evidence. An important issue for educational and psychological research is to determine how principles of learning theory and information about child development can be used to effectuate an appropriate balance in these types of situations. An important issue for legal consideration is to determine the extent to which third parties, such as teachers and administrators, will be given standing to assert the constitutional rights of students.

A related problem involves the same educational and psychological issues considered above. Because children are persons, a reasonable justification must be provided when their intellectual freedom is curtailed in a way that would be constitutionally impermissible for adults. Legal issues are mixed with social issues. Why is it, for example, that we do not permit the legal dissemination of obscenity in our culture? Is it possible or reasonable to define what is obscene for minors in the context of the subculture of the minors themselves? If so, can this type of reasoning be used to build a constitutional justification for limiting the exposure of children to indecent speech? How is indecent to be defined? Should indecent speech be prohibited for children and not for adults? For children in school only? What is the particular justification?

It has been suggested previously that if the material and substantial interference test of Tinker were extended to cover situations where the emotional, social or intellectual growth of students appeared to be threatened, it might usefully provide the necessary guidance for

assessing whether normally protected speech should be held unprotected in the school situation. In the public park, for example, citizens can constitutionally be exposed to propagandistic and vulgar speech. There it is the duty of the citizens to absent themselves if they desire to avoid indecent speech or speech which advocates violence. It is because students are not adult citizens and do not have the right to absent themselves from public school that the educational situation is unique.

The major criticism that could be made of the proffered extension of the Tinker test to cover these more difficult situations is that the test is vague. What types of materials would be likely to create a material and substantial interference with student emotional, social, or intellectual development? But like all multi-purpose constitutional tools, the vagueness is both necessary and purposeful. Educational and psychological theory, applied within a principled legal framework, will still be needed to resolve problems that arise in particular school situations.

Another relatively general problem to be investigated is the issue of intellectual freedom vs. indoctrination or whether the marketplace of ideas model is to be preferred in public education to the values inculcation approach. There is a strong strand in the legal literature that views the function of schooling almost exclusively as that of transmission of knowledge. In a Harvard Law Review article which is clearly pre-Tinker in tone, the assertion is made that one function of education is indoctrinative--the transmission of knowledge and values. Because children are not fully mature intellectually, the conclusion is reached that the free speech clause "is of questionable relevance to speech in

public elementary or secondary school classrooms."[10] The article has exerted a great deal of influence and continues to be extensively cited in the post-Tinker period. Another commentator, for example, argues that the marketplace of ideas model--or the analytic model as opposed to the prescriptive model--is not constitutionally compelled and that the "deliberate inculcation of the right societal values" is supported by history.[11] While it is true that one purpose of education is to transmit societal knowledge of facts and values; in a liberal, democratic society this transmission is not properly authoritarian, prescriptive, or doctrinaire. The transmission of values should arguably alternate with an analytic approach if intellectual freedom is to be protected and if the child's capacity for independent, creative thinking is to be fully developed.

The student's right to know will mean little if the underlying educational theory accords inordinate weight to the prescriptive as opposed to the analytic. It will also mean less to the extent that the school's learning environment is not made full and rich by the views of outside speakers; by views expressed on buttons, bumper stickers, and banners; and by views from the outside community brought into the school by petitions, books, and leaflets. Educational and legal arguments need to be elaborated which would deny school officials the right to enact and enforce total bans except in unusual circumstances and for limited periods. It can be argued that a long-term ban on buttons, rather than achieving an especially respected status, should be especially suspect. A captive audience, immature, to some extent unable to defend itself, forever precluded from an exchange of particular ideas

or from making assertions by wearing ever-popular buttons, is a constitutional anomoly.

Similar educational and legal principles should arguably limit state or local school board authority with regard to curricular development, the selection of textbooks, and the selection of library materials. That is, because the First and Fourteenth Amendments limit all state action with regard to intellectual freedom, it must be true that there is an outer limit to the scope of state control over the intellectual life of the student. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[12]

Some cases suggesting that the state could exert complete control over the curriculum have involved teacher attempts to secure a voice in curriculum development (or school board attempts to limit that involvement) through provisions in collective bargaining agreements. Whether or not the limited, bilateral model of collective bargaining is an appropriate forum for resolving educational policy issues of such importance is open to question. But even if academic freedom can be promoted by the mutual agreement of school boards and teacher groups without conflicting with state labor laws or with the U. S. Constitution, some additional mechanism may need to be developed to insure that a variety of other groups are heard.

The problem of the limit to state authority with regard to public education is primarily legal. The question will be whether or not persuasive constititutional arguments can be developed with which to counter the following type of assertion. "[I]t should not be a matter

of first amendment concern if a school system were to determine that it wanted to control, as far as possible, all inputs into a student's learning process while he is in school. . . ."[13] While it is certainly true that state officials have comprehensive authority with regard to the education of children, that authority must nevertheless be exercised with due regard for the constitutional rights of the students. At a minimum, the First Amendment prohibits the type of indoctrination invisioned here.

After fundamental constitutional rights have been guaranteed, the limits of state action defined, and overbroad and standardless delegation curtailed, the next task would be to develop the educational means for broad-based participation in curricular development. This should arguably be an on-going process which would involve teachers, librarians, other professional educators, school board members, parents, and students. Because the personal interest of individual students and parents, while important and necessary, is relatively transient, school boards should arguably rely on professional educators to provide continuity and much of the long-term planning. To deny a professionally trained librarian, for example, the right to participate in the development of a school library is probably unconstitutional and surely educationally unwise. But each area of educational planning will be unique. Different groups will be involved to a greater or lesser extent as the need for a broader, more general perspective is required or as the need for greater professional expertise becomes necessary. Good procedures for allowing optimal participation and cooperation will derive from experimentation. But the state cannot be the lone

participant in the decisionmaking process. Better decisions will likely be made to the extent that reasonable methods are developed which optimize the participation of various constituencies.

Another area which deserves in-depth investigation and treatment concerns the issue of prior review of the student press. Where permitted, model prior review policies need to be developed which would serve the legitimate educational objectives of prior review while at the same time preserving the free press rights of students. Studies should be undertaken to determine whether prior review policies are more effective than advisory systems in achieving an appropriate level of control of the student press. At present there appears to be much confusion among school officials, teachers, and students as to what is constitutionally subject to suppression and what is protectable speech. This confusion results in overreaction and an undue chilling of intellectual freedom.

A related issue involves the question of whether or not it is especially important to protect individuals from defamation in the school environment--whether or not defamation in school could be said to have the potential for irreparable injury. If it is students who perpetrate the defamation, they may not be financially able to pay appropriate damages to the individuals defamed. If it is captive and immature students who are defamed, they may be particularly vulnerable to psychological injury. Whether or not prior review policies are necessary to protect this and other legitimate interests will only become clear after further experience and investigation.

Another line of research which has been suggested by this investigation would involve studies of the impact of the Tinker case on school

administrators and school board members. Whether or not educators are familiar with the decision and understand it, and whether or not their behavior conforms to the holding could be examined in practical settings.

It has also become apparent that the propositions of the Tinker decision itself have had a far-reaching effect on courts at all levels. A variety of children's rights cases from child abuse and child custody cases to delinquency cases have cited the Tinker decision. A detailed examination of the impact of Tinker on children's rights in general could also be undertaken.

And perhaps the most delicate problem for further investigation and resolution concerns the appropriate balance when the First Amendment rights of speech and religion conflict. The values promoted by all aspects of the First Amendment must be carefully considered in each case to provide the kinds of solutions that will foster true freedom of communication and belief.

Freedom of intelligence is perhaps the only freedom of enduring individual and social importance in our society. To be intellectually free is the means and the end of education in a democracy. Because the public school is dedicated to teaching and learning, it is even more important to the development and preservation of intellectual freedom than the great public forums of the street, the sidewalk, and the park. It is this special purpose which makes the public school the most sacrosanct public forum of all.

NOTES

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79. See, e.g., "Developments in the Law--Academic Freedom," 81 Harvard Law Review 1045 (1968); Stephen R. Goldstein, "The Asserted Constitutional Right of Public School Teachers to Determine What They Teach," 124 Pennsylvania Law Review 1293 (1976). See also James v. Bd. of Educ., 461 F.2d 566, 573 (2d Cir. 1972).

80. See, e.g., Cornwall v. State Bd. of Educ., 314 F.Supp. 340 (D.C. Md. 1969), aff'd, 428 F.2d 471 (1970), cert. denied 400 U.S. 942 (1970); Medieros v. Kiyosaki, 478 P.2d 314 (Hawaii 1970).

81. Vaughn v. Reed, 313 F.Supp. 431 (D. Va. 1970).

82. Davis v. Page, 385 F.Supp. 395 (D. N.H. 1974).

83. Ibid., p. 397.

84. See, e.g., Williams v. Bd. of Educ., 388 F.Supp. 93 (D. W.Va. 1975); Todd v. Rochester Community Schools, 200 N.W.2d 90 (Mich. App. 1972).

85. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

86. Ibid., p. 642.

87. Goetz v. Ansell 477 F.2d 636, 638 (2d Cir. 1973). See also Maryland v. Lundquist, 278 A.2d 263 (1971).

88. Banks v. Bd. of Educ., 314 F.Supp. 285 (D. Fla. 1970), aff'd mem., 450 F.2d 1103 (5th Cir. 1971).

89. Frain v. Baron, 307 F.Supp. 27 (D. N.Y. 1969).

90. See generally Lawrence Tribe, American Constitutional Law (Mineola, N.Y.: The Foundation Press, 1978), pp. 886-9.

91. Merriken v. Cressman, 364 F.Supp. 913 (E.D. Pa. 1973).

92. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Ct., 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

93. Close v. Lederle, 424 F.2d 988 (1st Cir. 1970), cert. denied, 400 U.S. 903 (1971).

94. Charles Alan Wright, "The Constitution on the Campus," 22 Vanderbilt Law Review 1027, 1058 (1969); Thomas I. Emerson, "Toward a General Theory of the First Amendment," 72 Yale Law Journal 877, 938 (1963).

95. Cohen v. California, 403 U.S. 15, 26 (1971).

96. Tractman v. Anker, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978).

97. Ibid., p. 520.

98. Ibid., p. 517.

99. Ibid., p. 520.

100. Ibid., (concurring opinion) p. 520.

101. Ibid., (dissenting opinion) p. 521.

102. Ibid., p. 526.

Chapter IV

1. Thomas I. Emerson, "The Doctrine of Prior Restraints," 20 Law and Contemporary Problems 648, 649 (1955).

2. Near v. Minnesota, 283 U.S. 691 (1931).

3. U.S. Const. amend. I. The amendment provides that "Congress shall make no law. . . abridging the freedom. . . of the press. . . ."

4. Near v. Minnesota, 283 U.S. 691, 716 (1931).

5. Times Film Corporation v. City of Chicago, 365 U.S. 43 (1961).

6. Ibid., p. 64 (Warren, C.J., dissenting).

7. Ibid.

8. Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970, Vintage Books Edition, 1971), p. 509.

9. Ibid., p. 511.

10. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Tinker v. Des Moines, 393 U.S. 503 (1969).

11. See Scoville v. Bd. of Educ., 425 F.2d 10 (7th Cir. 1970), cert. denied 400 U.S. 826. But see Vail v. Bd. of Educ. 354 F.Supp. 592 (D. N.H. 1973), vacated and remanded, 502 F.2d 1159 (1973).

12. See Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).

13. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

14. Fujishima v. Bd. of Educ., 460 F.2d 1355 (7th Cir. 1972).

15. See Jacobs v. Bd. of School Commissioners, 490 F.2d 601, (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975).

16. Fujishima v. Bd. of Educ., 460 F.2d 1355, 1355 (7th Cir. 1972).

17. Ibid., p. 1358.

18. See also Quarterman v. Byrd, 453 F.2d 54, 60 n.11 (4th Cir. 1971).

19. Leon Letwin, "Administrative Censorship of the Independent Student Press--Demise of the Double Standard?" 28 South Carolina Law Review 565 (1977) [hereinafter cited as "Administrative Censorship"].

20. Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freinmuth, 478 F.2d 1345 (4th Cir. 1973); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).

21. Leon Letwin, "Administrative Censorship," 28 South Carolina Law Review 565, 584 (1977).

22. Ibid., p. 585.

23. Frasca v. Andrews, 463 F.Supp. 1043 (E.D. N.Y. 1979).

24. Ibid., p. 1051.

25. Ibid., p. 1046.

26. Egner v. Texas City Independent School Dist., 338 F.Supp. 931 (S.D. Tex. 1972).

27. See, e.g., Baughman v. Freienmuth, 487 F.2d 1345 (4th Cir. 1973); Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972); Riseman v. School Committee, 439 F.2d 148 (1st Cir. 1971); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971).

28. Eisner v. Stamford Bd. of Educ. 440 F.2d 803 (2d Cir. 1971); Hernandez V. Hanson, 430 F.Supp. 1154 (D. Neb. 1977).

29. Eisner v. Stamford Bd. of Educ. 440 F.2d 803, 805 (2d Cir. 1971).

30. Ibid., p. 807.

31. Ibid., p. 808.

32. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

33. Near v. Minnesota, 283 U.S. 697 (1931).

34. Tinker v. Des Moines, 393 U.S. 503 (1969).

35. Shanley v. Northeast Independent School District, 462 F.2d 906, 971 (5th Cir. 1972).

36. Baughman v. Freinmuth, 478 F.2d 1345 (4th Cir. 1973).

37. Ibid., p. 1350.

38. Leibner v. Sharbaugh, 429 F.Supp. 744 (D. Va. 1977).

39. Pliscou v. Holtville Unified School Dis., 411 F.Supp. 826 (D. Cal. 1976).

40. Hernandez v. Hanson, 430 F.Supp. 1154 (D. Neb. 1977).

41. Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

42. Freedman v. Maryland, 380 U.S. 51 (1965).

43. Ibid., pp. 810-11.

44. Baughman v. Freinmuth, 478 F.2d 1345, 1351 (4th Cir. 1973).

45. Ibid., p. 1351.

46. Leibner v. Sharbaugh, 429 F.Supp. 744 (D. Va. 1977).

47. Pliscou v. Holtville Unified School Dist., 411 F.Supp. 844 (D. Cal. 1976).

48. Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972).

49. Ibid.

50. Ibid., p. 966 n.2.

51. Ibid., p. 964.

52. Ibid., p. 978.

53. Ibid., p. 972.

54. Federal Courts of Appeals have explicitly or implicitly approved general systems of prior review in the following circuits: 1st, 2nd, 4th, 5th. Federal District Courts in the 8th and 9th Circuits have also allowed prior review.

55. Leon Letwin, "Administrative Censorship," 28 South Carolina Law Review 565, 584 (1977).

56. Schwartz v. Schuker, 298 F.Supp. 238, 241 (E.D. N.Y. 1969).

57. Graham v. Houston Independent School Dist., 335 F.Supp. 1164 (S.D. Tex. 1970).

58. Schwartz v. Schuker, 298 F.Supp. 238 (E.D. N.Y. 1969); Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973), cert. denied, 414 U.S. 1032 (1974); Graham v. Houston Independent School Dist., 335 F.Supp. 1164 (S.D. Tex. 1970).

58. Schwartz v. Schuker, 298 F.Supp. 238 (E.D. N.Y. 1969); Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973), cert. denied, 414 U.S. 1032 (1974); Graham v. Houston Independent School Dist., 335 F.Supp. 1164 (S.D. Tex. 1970).

59. Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973), cert. denied, 414 U.S. 1032 (1974); Graham v. Houston Independent School Dist., 335 F.Supp. 1164 (S.D. Tex. 1970).

60. Schwartz v. Schuker, 298 F.Supp. 238 (E.D. N.Y. 1969).

61. Sullivan v. Houston Independent School Dist., 333 F.Supp. 1149 (D.C. Tex. 1971), vacated 475 F.2d 1071 (5th Cir. 1973).

62. Ibid., 475 F.2d 1071 (5th Cir. 1973), cert. denied, 414 U.S. 1032 (1974); Graham v. Houston Independent School Dist., 335 F.Supp. 1164 (S.D. Tex. 1970).

63. See, e.g., Sullivan v. Houston Independent School Dist., 475 F.2d 1071, 1077 (5th Cir. 1973), cert. denied, 414 U.S. 1032 (1974).

64. See, e.g. Leibner v. Sharbaugh, 429 F.Supp. 744 (D. Va. 1977); Baughman v. Freinmuth, 478 F.2d 1345 (4th Cir. 1973).

65. Lawrence Tribe, American Constitutional Law (Mineola, N.Y.: The Foundation Press, 1978), p. 711.

66. Cintron v. Bd. of Educ., 384 F.Supp. 674 (D. P.R. 1974).

67. Vail v. Bd. of Educ., 354 F.Supp. 592 (D. N.H. 1973), vacated and remanded, 502 F.2d 1159 (1973).

68. Zuker v. Panitz, 299 F.Supp. 102 (S.D. N.Y. 1969).

69. Ibid., p. 103.

70. Scoville v. Bd. of Educ., 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970).

71. See, e.g., Charles Alan Wright, "The Constitution on the Campus" 22 Vanderbilt Law Review 1027 (1969); Sheldon H. Nahmod, "Beyond Tinker: The High School as an Educational Public Forum," 5 Harvard Civil Rights Law Review 278, 283 (1970). See also Graham v. Houston Independent School Dist., 335 F.Supp. 1164 (S.D. Tex. 1970).

72. Bayer v. Kinzler, 383 F.Supp. 1164 (E.D. N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1974).

73. Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977).

74. See also Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972); Zuker v. Panitz, 299 F.Supp. 102 (S.D. N.Y. 1969).

75. Gambino v. Fairfax County School Bd., 429 F.Supp. 731 (E.D. Va. 1977), aff'd per curiam, 564 F.2d 157 (4th Cir. 1977).

76. Koppell v. Levine, 347 F.Supp. 456 (E.D. N.Y. 1972).

77. Ibid., p. 459.

78. Miller v. California, 413 U.S. 15 (1973); Ginsberg v. New York, 390 U.S. 629 (1968).

79. Meltzer v. Bd. of Public Instruction, 577 F.2d 311 (5th Cir. 1978). But see Hernandez v. Hanson, 430 F.Supp. 1154 (D. Neb. 1977).

80. Meltzer v. Bd. of Public Instruction, 584 F.2d 559, 580 (5th Cir. 1977), aff'd in part, rev'd in part on rehearing, 577 F.2d 311 (5th Cir. 1978) (dissenting opinion).

81. Ibid., p. 581.

82. Ibid.

83. For the opinion that "indecent language" can properly be prohibited in schools see Baker v. Downey City Bd. of Educ., 307 F.Supp. 517 (D. Cal. 1969); Thomas v. Bd. of Educ., 607 F.2d 1043, 1056 (2d Cir. 1979) (concurring opinion).

84. Thomas v. Bd. of Educ., 605 F.2d 1043 (2d Cir. 1979); Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972). See also Cintron v. Bd. of Educ., 384 F.Supp. 674 (D. P.R. 1974); Baker v. Downey City Bd. of Educ., 307 F.Supp. 517 (C.D. Cal.1969).

85. Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972).

86. Thomas v. Granville Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979).

87. Ibid.

88. Ibid.

89. Hernandez v. Hanson, 430 F.Supp. 1154 (D. Neb. 1977).

90. Panarella v. Birenbaum, 302 N.Y.S.2d 427 (Sup. Ct. 1969).

91. Ibid., p. 431.

92. See, e.g., Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977); Joyner v. Whiting 477 F.2d 456 (4th Cir. 1973); Zuker v. Panitz, 299 F.Supp. 102 (S.D. N.Y. 1969).

93. Baker v. Downey City Bd. of Educ., 307 F.Supp. 517, 527 (D. Cal. 1969).

94. Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979).

95. Ibid., p. 1057 (concurring opinion).

96. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

97. Ibid., p. 775 (Brennan, J., dissenting).

98. Compare Miller v. California, 413 U.S. 15 (1973) with Roth v. U.S., 354 U.S. 476 (1957).

99. But see Norman Dorsen, Paul Bender, and Burt Newborne, Emerson, Haber and Dorsen's Political and Civil Rights in the United States, 4th ed., Vol. I (Boston: Little, Brown, and Co., 1976), p. 568; Comments, "Constitutional Aspects of Removing Books From School Libraries," 66 Kentucky Law Journal 127 (1977).

100. Ginsberg v. New York, 390 U.S. 629 (1968). See also Cohen v. California, 403 U.S. 15 (1971); FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

101. Tinker v. Des Moines, 393 U.S. 503 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

102. See, e.g., Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973), cert. denied, 414 U.S. 1032 (1974); Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972); Hernandez v. Hanson, 430 F.Supp. 1154 (D.C. Neb. 1977).

103. See Comments, "Constitutional Aspects of Removing Books From School Libraries," 66 Kentucky Law Journal 127 (1977).

104. Lawrence Tribe, American Constitutional Law (Mineola, N.Y.: The Foundation Press, 1978), pp. 580-84.

105. Ibid., pp. 688-93. See also Harry Kalven, Jr., "The Concept of the Public Forum: Cox v. Louisiana," 1965 Supreme Court Review 1 (1965).

106. Lawrence Tribe, American Constitutional Law (Mineola, N.Y.: The Foundation Press, 1978), p. 689.

107. Ibid., p. 690; Comments, "The Public School as a Public Forum," 54 Texas Law Review 90 (1975); Sheldon H. Nahmod, "Beyond Tinker: The High School as an Educational Public Forum," 5 Harvard Civil Rights Law Review 278 (1970).

108. Katz v. Mc Aulay, 438 F.2d 1058 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972).

109. Ibid., p. 1061.

110. Cloak v. Cody, 326 F.Supp. 391 (M.D. N.C. 1971), vacated as moot, 449 F.2d 781 (4th Cir. 1971).

111. Riseman v. School Committee, 439 F.2d 148 (1st Cir. 1971); Pliscou v. Holtville Unified School Dist., 411 F.Supp. 842 (D. Cal. 1976); Hernandez v. Hanson, 430 F.Supp. 1154 (D. Neb. 1977); Peterson v. Bd. of Educ., 370 F.Supp. 1208 (D. Neb. 1973).

112. Riseman v. School Committee, 439 F.2d 148, 149 (1st Cir. 1971).

113. Hernandez v. Hanson, 430 F.Supp. 1154, 1158 (D. Neb. 1977).

Chapter V

1. Harrod v. Bd. of Educ., 500 S.W.2d 1 (Mo. App. 1973).

2. Calvin v. Rupp, 334 F.Supp. 358 (E.D. Mo. 1971), aff'd, 471 F.2d 1346 (8th Cir. 1973).

3. Whitesel v. Southeast Local School Dist., 484 F.2d 122 (6th Cir. 1973).

4. Ibid., p. 1230.

5. Knarr v. Bd. of School Trustees, 317 F.Supp. 832 (N.D. Ind. 1970), aff'd, 452 F.2d 649 (7th Cir. 1971).

6. Robbins v. Bd. of Educ., 313 F.Supp. 642 (N.D. Ill. 1970).

7. Ibid., p. 647.

8. Pyle v. Washington County School Bd., 238 So.2d 121, 122 (Fla. App. 1970).

9. Ibid., p. 123.

10. Moore v. School Bd., 264 F.Supp. 355 (D.C. Fla. 1973).

11. Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), cert. denied, 411 U.S. 927 (1973).

12. Mercer v. Michigan State Bd. of Educ., 379 F.Supp. 580 (E.D. Mich. 1970), aff'd, 419 U.S. 1081 (1974).

13. Board of Educ. v. Rockaway Township Educ. Ass'n, 295 A.2d 380 (N.J. Sup. 1972).

14. Plano v. Baker, 504 F.2d 595 (2d Cir. 1974).

15. U.S. v. Coffeeville Consolidated School Dist., 513 F.2d 244 (5th Cir. 1975), rehearing denied, 520 F.2d 1405 (1975).

16. Morrison v. State Bd. of Educ., 82 Cal. Rptr. 175, 461 P.2d 375 (1969).

17. Gish v. Board of Educ., 366 A.2d 1337 (N.J. Super. 1976).

18. Ibid., p. 1341.

19. Ibid., pp. 1341-2.

20. Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), cert. denied, 419 U.S. 836 (1974). For the view that teachers cannot be transferred, demoted or otherwise punished for engaging in free speech see also Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973); Adcock v. Board of Educ., 513 P.2d 900 (Ca. 1973).

21. Celestine v. Lafayette Parish School Bd., 284 So.2d 650, 652 (La. App. 1973).

22. Ibid.

23. Frison v. Franklin County Bd. of Educ., 596 F.2d 1192 (4th Cir. 1979).

24. Ibid., p. 1195.

25. Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971).

26. Ibid., p. 1243.

27. Ibid.

28. See, e.g., Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970).

29. Miller v. California, 413 U.S. 15 (1973); Roth v. U.S. 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

30. Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring). p. 197.

31. Keafe v. Geanakos, 418 F.2d 359, 361 (1st Cir. 1969).

32. Parducci v. Rutland, 316 F.Supp. 352, 355 (M.D. Ala. 1970).

33. Ibid., p. 366.

34. Salvail v. Nashua Bd. of Educ., 469 F.Supp. 1269 (D. N.H. 1979).

35. Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974).

36. Ibid., pp. 975-6.

37. Ibid., p. 984.

38. Ibid., p. 992 (dissenting opinion).

39. Oakland Unified School Dist. v. Olicker, 102 Cal. Rptr. 421 (Cal. App. 1972).

40. These stories are reprinted in the dissenting opinion at pp. 432-3.

41. Ibid., p. 433 (dissenting opinion).

42. Ibid., p. 431 (concurring opinion).

43. Ibid., p. 425.

44. Ibid., pp. 428-9.

45. See, e.g., Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970).

46. Board of Education v. Rockaway Township Educ. Ass'n, 295 A.2d 380 (1972). See also Ahern v. Board of Educ., 456 F.2d 399 (8th Cir. 1972).

47. Mercer v. Michigan State Bd. of Educ., 379 F.Supp. 580 (E.D. Mich. 1970), aff'd, 419 U.S. 1081 (1974).

48. Singleton v. Wulff, 428 U.S. 106 (1976); Craig v. Boren, 429 U.S. 190 (1976).

49. Bicknell v. Vergennes Union High School Bd. of Dirs., 475 F.Supp. 615 (D.C. Vt. 1979). See also Presidents Council Community School Bd., 457 F.2d 289 (2d Cir. 1972), cert. denied, 409 U.S. 998 (1972).

50. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

51. Ibid., p. 361.

52. Ibid., p. 362.

53. Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970).

54. Ibid., p. 355.

55. Ibid., p. 355. See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

56. Ibid., p. 355.

57. Webb v. Lake Mills Community School Dist., 344 F.Supp. 791 (N.D. Iowa 1972).

58. Moore v. Gaston County Bd. of Educ., 357 F.Supp. 1037 (W.D. N.C. 1973).

59. Lindros v. Governing Bd., 510 P.2d 361, 108 Cal. Rptr. 185 (1973), cert. denied, 414 U.S. 112 (1973).

60. Harris v. Mechanicville School Dist., 382 N.Y.S.2d 251 (Sup. Ct. 1976).

61. Wilson v. Chancellor, 418 F.Supp. 1358 (D.C. Ore. 1976).

62. Sterzing v. Fort Bend Independent School Dist., 376 F.Supp. 657 (D.C. Tex. 1972), remedy vacated, 496 F.2d 92 (5th Cir. 1974).

63. Ibid., p. 660.

64. Carey v. Board of Educ., 427 F.Supp. 945 (D. Colo. 1977).

65. Ibid., p. 956.

66. Ibid.

67. Simon v. Jefferson Davis Parish School Bd., 289 So.2d 511 (La. App. 1974).

68. Ibid., p. 516.

69. Ibid., p. 517.

70. Carey v. Board of Educ., 427 F.Supp. 945, 955 (D. Colo. 1977).

71. See, e.g., Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); Carey v. Board of Educ., 427 F.Supp. 945 (D. Colo. 1977); Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970).

72. Moore v. School Bd., 364 F.Supp. 355 (D.C. Fla. 1973); Knarr v. Bd. of School Trustees, 317 F.Supp. 832 (N.D. Ind. 1970), aff'd 452 F.2d 649 (7th Cir. 1971).

73. See Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974), cert. denied, 421 U.S. 965 (1975); Birdwell v. Hazelwood School Dist., 491 F.2d 490 (8th Cir. 1974); Ahern v. Board of Educ., 456 F.2d 399 (8th Cir. 1972); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Moore v. School Bd., 364 F.Supp. 355 (D.C. Fla. 1973).

74. Ahern v. Board of Educ., 456 F.2d 399, 403-04 (8th Cir. 1974).

75. River Dell Educational Ass'n v. River Dell Bd. of Educ., 300 A.2d 361 (N.J. Super. 1973). Compare Nigosian v. Weiss, 343 F.Supp. 757 (E.D. Mich. 1971).

76. Carey v. Board of Educ., 427 F.Supp. 945, 954 (D. Colo. 1977).

77. See, e.g. Board of Regents v. Roth, 408 U.S. 564 (1972). In addition, when a teacher makes a plausible claim that there has been a violation of a fundamental right, procedural protections will also be provided.

78. Mailloux, v. Kiley, 323 F.Supp. 1387, 1392 (D. Mass. 1971), aff'd, 448 F.2d 1242 (1st Cir. 1971).

79. Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970).

80. Ibid., p. 367.

81. Ibid.

82. Ibid.

83. Mailloux v. Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971), aff'g, 323 F.Supp. 1387 (D. Mass. 1971).

84. See, e.g., Moore v. School Bd., 367 F.Supp. 355 (D.C. Fla. 1973); Webb v. Lake Mills Community School Dist., 344 F.Supp. 791 (N.D. Iowa 1972); Lindros v. Governing Bd., 108 Cal. Rptr. 185, 510 P.2d 361 (1973), cert. denied, 414 U.S. 112 (1973).

85. Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969). See also Mailloux v. Kiley, 323 F.Supp. 1387 (D. Mass. 1971), aff'd, 448 F.2d 1242 (1st Cir. 1971); Simon v. Jefferson Davis Parish School Bd., 289 So.2d 511 (La. App. 1974).

86. See discussion supra at 112-13.

87. Simon v. Jefferson Davis Parish School Bd., 289 So.2d 511 (La. App. 1974).

88. Ibid., p. 517.

89. Ibid.

90. Ibid.

91. Tinker v. Des Moines, 393 U.S. 503, 506 (1969).

92. James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972).

93. Ibid., p. 571.

94. Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973).

95. Ibid., p. 634.

96. Tinker v. Des Moines, 393 U.S. 503, 509 (1969).

97. Adcock v. Board of Educ., 513 P.2d 900 (Cal. 1973).

98. Ibid., p. 906.

99. Bertot v. School Dist., 522 F.2d 1171 (10th Cir. 1971).

100. Jergeson v. Board of Trustees, 476 P.2d 481 (Wyo. 1970).

101. Downs v. Conway School Dist., 328 F.Supp. 338 (E.D. Ark. 1971).

Chapter VI

1. Tinker v. Des Moines, 393 U.S. 503 (1969).
2. Ibid., p. 511.
3. Ibid., p. 515 (Stewart, J., concurring).
4. Ibid., p. 511.
5. Ginsberg v. New York, 390 U.S. 629 (1968).
6. Tinker v. Des Moines, 393 U.S. 503, 506 (1969).
7. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Tinker v. Des Moines, 393 U.S. 503 (1969).
8. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
9. Ibid.
10. "Developments in the Law--Academic Freedom," 81 Harvard Law Review 1045 (1968).
11. Stephen R. Goldstein, "The Asserted Constitutional Right of Public School Teachers to Determine What They Teach," 124 University of Pennsylvania Law Review 1293 (1976). See also Case Note, "First Amendment--Free Speech: Right to Know--Limit of School Board's Discretion in Curricular Choice--Public School Library as Marketplace of Ideas," 27 Case Western Reserve Law Review 1034 (1977).
12. Tinker v. Des Moines, 393 U.S. 503, 511 (1969).
13. Stephen R. Goldstein, "The Asserted Constitutional Right of Public School Teachers to Determine What They Teach," 124 University of Pennsylvania Law Review 1293, 1354 (1976).

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